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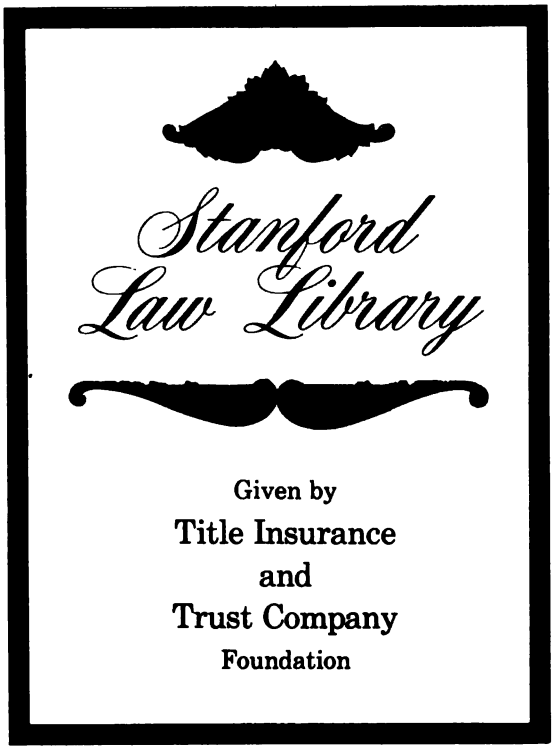
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Dispone

The word, Dispone, includes Selling by a Missive - Case of Elliott. 1803. Mor. 15542. approved of by Lord Moncreiff & L. Judge in Case of Murray (Cockspow) H. of Lords. 4 Sept. 1846

Held also by H. of L. Ds. (Eldon Chan.) to include alienation by Long lease. Elliott. 14. 1821. Wils. & Sh. 1. p 16. Reversing Judgt. of Court of Sess.

Terms generally used in Entails - are 'Sell alienate or Dispone' - Of these 'Dispone' is held to be the most general and to be Equivalent to the others. So also it was held in Case of Stirling & Dunn, 3 Wils. & Shaw 462., that a general prohibition in an Entl. against "disponing" struck at a long Lease.

Reversing Judgmt. of Ct. of Session.

I greatly doubt the soundness of these judgments in Ct. of last resort. They have been generally disapproved of by good feudal Lawyers - E.g. Lord Corehouse in Case of Moodie - Speid & Speid: but now they must be taken as settling the Law.

Effect of the word Dispone has long before been determined in Case of Creditors of Stumbie Feb 8 1758 Mor 15506.

TREATISE

ON THE

DEEDS AND FORMS

USED IN THE

CONSTITUTION, TRANSMISSION, AND EXTINCTION

OF FEUDAL RIGHTS.

BY ALEXANDER DUFF,

WRITER TO THE SIGNET.

EDINBURGH:

BELL & BRADFUTE, 12. BANK STREET.

MDCCCXXXVIII.

Printed by James Walker,
6. James's Court, Lawnmarket,
Edinburgh.

TO THE HONOURABLE

LORD CUNINGHAME,

ONE OF THE SENATORS OF THE COLLEGE OF JUSTICE.

My Lord,

I beg to offer my warm acknowledgments for the honour which your Lordship has done me in regarding favourably the effort I have now made to treat of the practice of Feudal Conveyancing. Although I have entertained the natural, but very selfish wish, to place my work under the patronage of one whose character, station, and knowledge of the subject would recommend it to the favourable notice of the profession, I may be permitted to add, that I desire, by this testimony of my respect and esteem, in some measure to evince my feeling of the courtesy and kindness uniformly experienced by me in the intercourse which I have had the honour to hold with your Lordship.

I remain,

Your Lordship's obliged and most obedient Servant,

ALEXANDER DUFF.

PREFACE.

THE plan of the following Treatise embracing a short account of the origin of the different subjects to which it relates, a historical introduction is thus rendered unnecessary.

Mr ROSS, in his published lectures, led the way in a branch of legal practice, which had formerly been esteemed wholly mechanical, to a more intellectual view of the subject. By means of his inquiries a large store of information on the origin and history of our system of deeds, highly valuable to the lawyer, the student and the practical conveyancer, was collected and bequeathed to the profession. Although the shape of his work is now felt to be inconvenient in reference, its authority remains unimpaired.

The Treatise of Mr ROBERT BELL, on the conveyance of land to a purchaser, is of a more practical nature, and has long been the most useful Manual in the library of the conveyancer.

Aware of the large amount both of knowledge of principles and of practical experience which these learned persons brought to bear on their subject, I cannot but feel much diffidence, in offering to the profession a work on the same branch of practice. Having ventured to extend the limits by which Mr

BELL'S work is narrowed, I am fully sensible of the risk which I have incurred, both in regard to the omission of some important particulars, and an erroneous conception of others, and I must throw myself on the indulgent consideration of the profession. I had long entertained the opinion that a work, combining a practical examination of the clauses of deeds with a copious reference to authorities, was much wanted by the profession, and it is to be regretted that the subject has not been taken up by an abler and more experienced hand.

The work was nearly completed before the appearance of the valuable Report of the Law Commission on the subject of conveyancing. The important suggestions of the Commission will demand much and deliberate consideration. The propositions contained in the conclusion of the Report will be found in the Appendix, (No. II.)

I have treated of the forms used in the attestation of writs, in a preliminary or introductory chapter. The subject is one of great importance and of considerable extent; and it appeared to me that this deviation from the ordinary plan of the work admitted of a more combined view of the present state of our practice in this branch of the inquiry.

The arrangement of the work is by *Chapters*, *Titles and Sections*, these last being occasionally subdivided into *Articles*. The numbers of the sections are carried on to the end of the work; and it is necessary to observe, that references from one part of the work to another are by the section, or the section and article, not by the page. The section with

which a page concludes is repeated at the top of the following page *below* the figures denoting the page.

Mr Ross, in his introductory address, says, " I " mean to quote authorities for whatever I advance " or reason from : I am sensible it becomes my know- " ledge, my experience, and situation in life ; none " of which entitle me to speak upon my own credit." Feeling these expressions to be peculiarly applicable to myself, I have endeavoured to avoid advancing statements on my own judgment. How far I have been successful in making the proper application of the authorities cited, it is for others to decide.

The clauses quoted in the notes are inserted for the purposes of reference, and are not always to be relied on as forming parts of continuous deeds or forms. I have frequently given examples of particular clauses of an important nature which have been under judicial discussion, being strongly impressed with the view, that terms and clauses which have received the sanction of the Court form the surest foundation of practice. On the other hand, such as have been found defective serve as a lesson of caution to the practitioner.

In citing decided cases, those contained in *Morrison's Dictionary* are marked " M." and those in *Brown's Supplement*, " B. S." followed by the page. The decisions reported by *Messrs Shaw, Dunlop, Bell and Murray* are referred to as in Vol. II. of Mr Shaw's valuable Digest.

EDINBURGH,
12*th November* 1838.

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TREATISE

ON

FEUDAL CONVEYANCING.

CHAPTER I.

OF THE FORM AND AUTHENTICATION OF WRITS.

TITLE I. WRITS IN GENERAL.

SECT. 1. DEFINITION.—A WRIT may be defined, an instrument by which the property of an individual is conveyed or affected, or his person subjected to the operation of the law. Writs by which obligations are undertaken, or corporeal subjects affected, are usually styled *Deeds*. A large class of deeds, again, receive from their purpose the name of *Conveyances*, and hence the branch of practice more immediately connected with them is styled CONVEYANCING.

2. DIVISION OF WRITS.— Writs, as regards their form and mode of authentication, may be divided into PRIVATE, OFFICIAL and PUBLIC. *Private* writs are granted or entered into by individuals in their private concerns, and are termed *Unilateral*, *Bilateral* or *Multilateral*, according as they are executed by one, two, or several parties. *Official* writs are the instruments of notaries, and the executions of messengers-at-arms and other officers of the law, and may be also called supplemental. They are testificates of the due performance of legal ceremonies, and have reference to other writs. *Public* writs consist of the interlocutors of judges, extracts from registers, summonses, diligences, and the like. The several descriptions of writs are regulated by different rules and forms

of authentication; and private and official writs, to which alone our subject refers, will therefore, with respect to these, be separately considered.

TITLE II. PRIVATE WRITS.

3. ESSENTIALS.—The essential parts of a writ or deed, (as respects its form,) relate to the *subject-matter*, the *parties*, the *shape*, and the *mode of attestation*.

Art. 1. *Subject-matter.* — A writ must contain the terms proper for expressing the intention of the parties, and the words of style suited to the nature of the agreement or conveyance of which it forms the evidence. The substantial parts thus differ according to the subject-matter of the writ.

2. *Parties.*—(1.) The parties to a deed must be described in it by their names and proper additions or designations, so as to be distinguished from all others (*a*). Where the identity is not clear, an error in, or the omission of the Christian name, will be fatal to the deed (*b*); and the practitioner ought to assume that blunders of this description will be strictly dealt with. (2.) A practice at one time prevailed of leaving a blank for the name of the creditor in moveable bonds, which thus passed from hand to hand like our modern bank-notes. The principal danger arising from the use of these imperfect writs, was probably to the system of which they formed a part; and the more immediate cause of their suppression appears to have been the endless litigation occasioned by the easy transmission of the *right*, and the attempts of the creditors of the several holders to attach the *subject*. Bonds subscribed and delivered blank in the name of the creditor are now void by statute (*c*). From the terms of the enactment, it has been inferred that the insertion of the name before delivery, even by a hand different from that of the writer of the deed, excludes the nullity (*d*); but it may, perhaps, be doubted if that doctrine would now be supported. (3.) The enactment has been extended to deeds of entail containing a number of substitutions, but so as to affect only that particular nomination to which the blank applies. It is at least clear that the nullity is not pleadable against disponees primarily

favoured, on account of blanks in the nomination of postponed parties, or parties for whom separate interests are intended (*e*).

3. *Shape.*—(1.) Until the end of the 17th century deeds were written on rolls of paper pasted together lengthways, and in practice the party subscribed at the joinings, although this was not a statutory requisite (*g*), as well as at the end. The modern shape of our writs was introduced by a statute (*h*), which, although not imperative, has been closely followed in practice. It allows all contracts, dispositions, decrees and other securities to be made up and written by way of book, in leaves of paper either in *folio* or *quarto*, provided that the testing clause make mention of the number of pages, every page being marked by the number first, second, &c., and signed as the margins were before, and the last page signed by the witnesses. These provisions are thus conditions of the permission conferred by the enactment. Their purpose was obviously to prevent the interpolation of additional leaves in the middle of a completed writ; and as this is considered impracticable when the deed is written on a single sheet of paper, although consisting of more than two pages, the subscription by the party of the last page, whether the second, third, or fourth of the sheet, has been held sufficient (*i*). The pages may be numbered by arithmetical figures, but words are usually employed (*k*). (2.) Deeds having the substantial parts in writing, and the formal clauses printed, have been sustained.

4. *Mode of attestation.*—The mode of attesting or authenticating deeds consists in the solemnities introduced by statute. These demand particular notice. They are classed amongst the essentials of writs, as being necessary to the completion of a formal deed, although the effect of their omission may be excluded by homologation. A general view of the solemnities originally in use, and since gradually introduced by statute, may be taken, before proceeding to consider the present state of the practice in the attestation of deeds.

(*a*) Ersk. 3. 2. 6.

(*b*) Reid, 7th March 1835, F. C. and 13 S. 619. See Keiller, 16th June 1826, 4 S. 724.

(*c*) Act 1696, c. 25. Our Soveraign Lord considering that the subscribing of bonds assignations and dispositions and other deeds blank in the name of the person in whose favors they are granted as also that the intrusting of persons without any declaration or back-bond of Trust in writing from the persons intrusted are occasions of fraud as also of many pleas and contentions Doth therefore with advice and consent of the Estates of Parliament *Statute and Ordain* that for hereafter no bonds assignations dispositions or other deeds be subscribed blank in the person or person's name in whose favors they are conceived and that the foresaid person or persons be either insert before or at the subscribing or at least in presence of the same witnesses who were witnesses to the subscribing before the delivery *certifying* that all writs otherwayes subscribed and delivered blank as said is shall be declared null And farder that no action of declarator of trust shall be sustained as to any deed of trust made for hereafter except upon a declaration or back-bond of trust lawfully subscribed by the person alleged to be the trustee and against whom or his heirs or assigneys the declarator shall be intented or unless the same be referred to the oath of party *simpliciter Declaring* that this act shall not extend to the indorsation of bills of exchange or the notes of any trading company.

(*d*) Ersk. 3. 2. 6.

(*e*) Kennedy, 13th July 1722, M. 1681; Abernethy, 17th Jan. 1835, F. C. and S. 13. 263.

(*f*) Creditors of Spot, M. 16,868; Stirling, 1st Dec. 1711, B. S. 4. 856. See Stair, 4. 42. 3; Bell on Testing of Deeds, 67.

(*g*) Ersk. 3. 2. 14.

(*h*) 1696, c. 15. Our Soveraign Lord understanding the great trouble and inconveniency the Liedges are put to in finding out of clauses and passages in long contracts decreets dispositions extracts transumpts and other securities consisting of many sheets battered together which must be either folded or rolled together Doth for remeid thereof with advice and consent of the Estates of Parliament *statute and ordain* that it shall be free hereafter for any person who hath any contract decreet disposition or other security above mentioned to write to choose whether he will have the same written in sheets battered together as formerly or to have them written by way of book in leafs of paper either in folio or quarto providing that if they be written bookways, every page be marked by the number first second &c. and signed as the margines were before and that the end of the last page make mention how may pages are therein contained in which page only witnesses are to sign in writs and securities where witnesses are required by law and which writs and securities being written bookways marked and signed as said is his Majesty with consent foresaid *declares* to be als valid and formal as if they were written on several sheets battered together and signed on the margin according to the present custom.

(*i*) Williamson, 21st Dec. 1742, M. 16,933; Smith, 4th July 1816, F. C.; Gillespie, 22d Dec. 1831, F. C. and S. 10. 174.

(*k*) Cassilis' Trustees, 2d June 1831, S. 9. 663.

4. SEALING, THE EARLIEST MODE OF AUTHENTICATION. —(1.) The forms employed in authenticating writs were gradually introduced and perfected. Prior to the act of

1540, the subscription of the party was not a solemnity. In Scotland, as in the other feudal nations which arose after the fall of the Empire, deeds both public and private were originally authenticated by means of a *sign* or *seal*—words then of the same import. They denoted the figure of the cross, the sign or seal of our redemption, which, in the early ages of Christianity, was adopted as the type of the solemn appeal made by the granter of a deed to the Author of our salvation, in evidence of his resolution to abide by the writ to which he had affixed a mark so sacred. Antiquaries inform us, that signing or sealing was acquired by the Franks and other feudal nations from the vanquished Romans, and was borrowed by our ancestors from the Anglo-Saxons. (2.) The original sign common to all gave place to the representation of a coat of arms, the initial letters of the name and surname, or others of a more complex description, invented by the fancy of individuals. These were engraved on hard substances, and to the operation of impressing them upon wax, the distinctive term *sealing* came to be applied. This improved mode of authentication, the second step in the advance from the verbal testimony of witnesses, although but a rude safeguard against fraud, was perhaps sufficient amongst a barbarous people whose transactions were few and notorious, and at a time when property was in the hands of a small number of feudal barons. (3.) At this early period, the names of such persons of note as were present at the authentication of the deed were usually inserted at the conclusion, but as witnesses, in the modern sense of the term, their presence does not appear to have been essential, as there was no form in use for recording the fact. It would appear, from the long list of names often added at the end of deeds, that the presence and mention of witnesses was more for parade than use.

Ruddiman; Ross; Erskine.

5. SUBSCRIPTION OF THE PARTY.—ACT 1540, c. 117.—The enactment of the first statute (*a*), passed for regulating the attestation of writs, is said to have been occasioned by the prevalence of the crime of forgery by the use of the seals

of the pretended granters after their death, a reason which is not inconsistent with the preamble (*b*). (1.) By this statute the subscription of the party to all writings under a seal was introduced as a solemnity, and according to the strict letter of the act, the subscriptions of at least two witnesses were to be added. The words are, "the subscription of him that awe "the samin, and witnesse (*c*)." It is more probable that the difficulty of procuring witnesses who could write their names was the cause of the uncertain practice which followed, than any doubt in regard to the true meaning of the words. It is certain, however, that the subscription of the witnesses fell into disuse. Occasionally, they subscribed without being mentioned in the deed, but more generally their names and designations were inserted, and their subscriptions dispensed with. (2.) At this period, it was a common practice for persons possessing land estates to subscribe the name or title of their lands, in place of their Christian name and surname. By an act respecting the office of Lord Lyon, and the bearing of arms, it is however declared, that "it is only "allowed for noblemen and bishops to subscribe by their titles; "and that all others shall subscribe their christened names, "or the initial letter thereof, with their surnames, and may, "if they please, adject the designation of their lands, prefixing "the word 'of' to said designations (*d*)."

(*a*) 1540, c. 117. It is statute and ordanit that becaus mennis seles may of adventure be tint quhairthrow gret hurt may be generet to them that awe the samin and that mennis seles may be fenzied or putt to writingis efter their deceis in hurt and prejudice of our Soverane Lord's liegis that therefor na faith be given in tyme cuming to ony obligation band or uther writting under ane sele without subscriptioun of him that awe the samin and witnesse; or ellis gif the party cannot write, with the subscriptioun of ane notar thereto.

(*b*) Erak. 3. 2. 7.

(*c*) This word appears, from Mr Thomson's edition, to be used in the plural. Compare it with the same word in 1579, c. 80.

(*d*) 1672, c. 21.

6. SUBSCRIPTION BY NOTARIES.—ACT 1579, c. 80. (*a*).—The uncertain practice which followed the passing of the statute of 1540 prevailed for a long period. It was not remedied by the act of 1579, which, if its terms are to be re-

garded in preference to the observations of Sir George Mackenzie (*b*), was intended to regulate not the attestation of deeds made by parties who could write, but to prescribe rules for the conduct of notaries acting for those who were ignorant or incapable of writing (*c*). The statute provided, that all writs importing heritable title, or bonds or obligations of great importance, should be subscribed and sealed by the parties, "if they can subscribe," words which do not go beyond the enactment of 1540. Otherwise they were to be subscribed by two notaries, in presence of four witnesses properly designated. But it was not required that witnesses should subscribe along with the party. The observation by Mackenzie, that two witnesses were necessary to the subscription of the party, is not warranted by the terms of the statute; and unless it were held that the enactment was meant to regulate the form of notarial attestation only, it would follow that four, and not merely two witnesses, were required to the subscription of the party himself, a conclusion which has not been drawn by any of our systematic writers. The practice which followed the enactment was accordingly not materially different from that which preceded. Witnesses did not subscribe, and where their names and designations were omitted, the Court allowed these to be supplied by a condescendence.

(*a*) 1579, c. 80. It is statute and ordained be our Sovereign Lord with advise of his three Estaites in Parliament that all contracts obligationes reversiones assignationes and discharges of reversiones or eikes thereto and generally all writs importing heritable title or utheris bands and obligationes of great importance to be maid in time cumming sall be subscrived and seilled be the principal parties gif they can subscrive otherwise be twa famous notars befoir four famous witnesse denominat be their special dwelling-places or sum uther evident tokens that the witnesse may be knawen being present at the time Otherwise the saidis writs to mak na faith.

(*b*) Observ. on the Statutes, p. 193.

(*c*) Ross, 1. 128.

7. DESIGNATION OF THE WRITER.—ACT 1593, c. 179.—At the period when the next statute on the subject of the attestation of writs bears date, the country does not yet appear to have reached that state of advancement in which subscribing witnesses could readily be procured, although a dis-

pensation with the use of seals, given some years before in relation to deeds having a clause of registration, proves that writing had come to be chiefly regarded in the attestation of deeds. (*a*) By the statute of 1593 (*b*), an additional solemnity was added, in the insertion, at the end of the deed, of the name and designation of the person by whom it is engrossed. This provision, had it been strictly enforced, was well calculated to be a safeguard against forgery, and to preserve additional evidence of the act of the granter; but the Court admitted extrinsic evidence, and sanctioned vague descriptions of the writer.

(*a*) 1584, c. 4. The Kingis Majestie with advise of the three Estaites of this present Parliament expones and declares that the act anent the sealing of writtes of importance is nocht to be understood of sik writtes contractes or obligationes as ar be the parties agreed upon to be registrat in the buiks of our Soveraine Lordis Councel or uther ordinar Judges seeing the parties consents to registrat the same Quhilk is ane greater solemne act nor the sealing thereof And that the non-sealing of the same sal be no exception against the validitie of the saidis writtes being subscribed be the parties and agreed on to be registrat as said is Quhilkis his Majestie and Estaites foresaidis declaris to neede na sealles Neither that the said act anent the saidis writtes to be subscribed be twa notars sal be extended to instrumentis of sesing quhairunto ane faithful notar with ane reasonable number of honest and famous witnesses is sufficient And this declaration to be observed as ane law in all time coming

(*b*) 1593, c. 179. Our Soveraine Lord and Estaites of this present Parliament understanding perfitely that falsettes increases daily within this realme and specially be the writing of the bodies of the contractis charteris obligationis reversionis assignationis and all utheris writtis and evidentis be the handwrite of sik personis as ar not commonly knawin and ar not common notaris nor bruikis na common office as writers within this realme And gif the writer were knawin the samine wald give great light to the tryal of the truth of the falset of the said writ and evident Therefore his Hienes with advice of the saidis Estaitis in Parliament decernis and declaris that all original chartouris contractis obligationis reversionis assignationis and all utheris writtes and evidentis to be maid hereafter sall mak special mention in the hinder end thereof before the inserting of the witnesse therein of the name surname and particular remaining-place diocese and uther denomination of the writer of the body of the foresaid original writtes and evidentes otherwais the same to mak na faith in judgment nor outwith in time coming And to begin upon the first day of November nixt to cum.

8. ACT 1681, c. 5. (*a*).—The Legislature did not alter the mode of authentication thus introduced for nearly a century. In 1681 was enacted that famous statute which has

placed our modern system on a footing of great security. By this time the country was ripe for the important addition of the subscriptions of the witnesses, and it is probable that the loose principles of interpretation then in vogue materially hastened the enactment. It proceeds upon the cause, that witnesses inserted in writs, and not subscribing, may easily disown their being witnesses, and declares that only subscribing witnesses shall be probative; that all writs wherein the writer and witnesses are not designed shall be absolutely null; that no witness shall subscribe as such to the subscription of the party, unless he know the party, and saw him subscribe, or saw or heard him give warrant to a notary or notaries to subscribe for him, and in evidence thereof touch the notary's pen; or that the party shall acknowledge his subscription to the witness. Witnesses, for disobedience of the statute, are subjected to punishment as accessory to forgery.

(*a*) 1681, c. 5. OUR SOVEREIGN LORD, considering that by the custom introduced when writing was not so ordinary, witnesses insert in writs, although not subscribing, are probative witnesses, and by their forgetfulness may easily disown their being witnesses. FOR REMEID whereof, his Majestie with advice and consent of the Estates of Parliament, doth ENACT and DECLARE, that only subscribing witnesses in writs to be subscribed by any partie hereafter shall be probative, and not the witnesses insert not subscribing: And that all such writs to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending upon the writer, or the designation of the writer and witnesses. AND it is further STATUTE and DECLARED, that no witness shall subscribe as witness to any party's subscription, unless he then know that party and saw him subscribe, or saw or heard him give warrand to a nottar or nottars to subscribe for him, and in evidence thereof touch the nottar's pen, or that the partie did at the time of the witnesses subscribing acknowledge his subscription: otherwise the saids witnesses shall be repute and punished as accessory to forgerie. AND seeing writing is now so ordinary, his Majesty with consent foresaid doth ENACT and DECLARE that no witnesses but subscribing witnesses shall be probative in instruments of seising, instruments of resignation *ad remanentiam*, instruments of intimation of assignations translations or retrocessions to bands contracts or other writs which shall happen to be subscribed in any time hereafter: AND that none but subscribing witnesses shall be probative in executions of messengers, of inhibitions, of interdictions, hornings or arrestments: and that no execution whatsoever to be given hereafter shall be sufficient to infer interruption of prescription in real rights, unless the same be done before witnesses present at the doing thereof subscribing: AND that in all the said cases, the witnesses be designed in the body of the writ, instrument or execution respective, otherwise the same shall be null and void, and make no faith in judgment nor outwith.

9. APPLICATION OF THE STATUTES.—The provisions introduced by the act of 1579, in so far as relates to execution by means of notaries, apply only to deeds importing heritable title or other *obligations of great importance*,—a doubtful phrase, but now fixed, by a uniform train of decisions, to mean those which exceed in value L.100 Scots, estimated with reference to the obligant. Deeds which relate to matters of less value, and, from favour to the wishes of dying persons, testaments, may be executed for those who cannot write, by one notary and two witnesses (*a*). The statute of 1681; seems, however, to be of universal application, although Mr Erskine expresses a contrary opinion, (*b*.) It was a principle anxiously kept in view by our Legislature, that deeds ought to be so authenticated, as to prove themselves, or be received in evidence without extraneous support, until judicially set aside on the ground of falsehood, and to achieve this, were the statutes to which reference has been made, enacted. Those deeds, accordingly, which are protected by the statutes, are in technical language *probative*, and can be challenged only in the form of reduction. By the character and privileges thus conferred upon formal writs, legal proceedings have been much restricted, execution against the person and property passing in course, upon a *pro forma* decree, obtained by recording the writ in a recognised public register. It follows that litigation is confined to those cases, of rare occurrence, where forgery or fraud has been an ingredient in the manufacture of the writ, or it has been extorted from the fears of the party. It is necessary to explain the present state of our practice in the attestation of private deeds.

(*a*) Erak. 2. 2. 23.
(*b*) Crichton, 21. July 1772, M. 17,047; Erak. 3. 2. 10.

10. MODE OF SUBSCRIPTION.—1. *Name and surname.*—(1.) The subscription by the party of his Christian or christened name, or its initial letter (*a*), and his surname, is the primary solemnity in the authentication of writings; and although in one instance the subscription of the surname, with the addition of the name of the granter's estate, without the prefix of the Christian name or its initial letter, has been sus-

tained (*b*), practice, which is the safest guide, has closely followed the direction of the statute. (2.) It is essential to the act of subscription, as evidence of consent, that it be adhibited by the hand of the party, and without assistance. The Court have viewed with much jealousy the giving assistance in the act of subscription, for the plain reason that the distinctive handwriting of individuals is the surest guard against forgery; the leading of the hand has been held fatal to the deed (*c*), and that in the formation even of a single syllable of the name or surname (*d*). Assistance given by tracing marks on the paper is equally objectionable (*e*).

2. *Subscription with initials.*—(1.) Subscription with the initial letters of the name and surname must be considered as an evasion of the statute of 1540, and of the subsequent statute of 1672. It cannot be deemed the subscription of the party, and it has only been defended on the very doubtful plea of necessity (*f*). It has, indeed, been successfully maintained that this latter enactment is only demonstrative, not exclusive or prohibitory of signing by initials (*g*); and the practice of so subscribing had, it is true, been sanctioned by a long course of prior decisions; but the Court have generally called for very ample evidence of consent. (2.) A deed thus subscribed is not probative. Where falsehood has been alleged, the Court have required proof both of subscription, and that by the evidence of the instrumentary witnesses, and of the party being in use to sign by initials (*h*). But when improbation has not been proponed, the grounds of determination have varied with the circumstances of each particular case. The most usual course appears, however, to have been to sustain the deed, upon proof by the instrumentary witnesses of the fact of subscription (*i*); or, after their death, to call for very ample evidence of the use by the party of this mode of signing (*k*).

3. *With a mark.*—There is no instance in the books of a writ requiring the solemnities of the statutes having been sustained, signed with a mark only. In the only reported case where the question seems to have fairly occurred, the Court held it irrelevant to allege, in support of a deed signed before three witnesses, with two marks which had no resemblance to

the initial letters of the party's name, that this was according to his ordinary mode of subscribing (*l*).

4. *By blind persons.*—(1.) It was for a long period a controverted point if blind persons could be regarded as capable of adhibiting their subscription to deeds in the sense of the act of 1579. In an early case (*m*), a deed was challenged on the ground that the party was incapable of knowing to what he set his name; but the objection was repelled, on the ratio that a blind person has the same access to be informed which they have who see and cannot read. In later cases the Court took a different view of the question (*n*), but it may now perhaps be held as set at rest by a recent decision (*o*) of the Court of last resort, in conformity with the case of Coutts. (2.) It is not essential that deeds shall be read over to blind persons prior to their attestation; and the *onus* of shewing that the party was not acquainted with the contents of a deed signed by him in a state of blindness, rests on the person challenging the deed (*p*). It is advisable, however, as a rule of practice, to read over the deed to the party, in presence of the instrumentary witnesses.

(*a*) 1672, c. 21; 1540, c. 117.

(*b*) Gordon, 21st June 1765, M. 16,818.

(*c*) Robertson, 20th Dec. 1744, Elch. *voce* Writ, No. 18; Falconer, 9th Jan. 1751, M. 16,817; Harkness, 14th Sept. 1821, 2 Murray, 558.

(*d*) Moncreiff, 14th July 1710, M. 15,936.

(*e*) Crosbie, 30th Nov. 1749, M. 16,814.

(*f*) Ersk. 3. 2. 8; Meek, 18th June 1707, 16,806.

(*g*) E. of Traquair, 16th Dec. 1724, M. 16,809.

(*h*) Coutts, 21st June 1681, M. 16,804.

(*i*) Carraway, 17th Jan. 1711, M. 16,802; Grierson, 14th Feb. 1633, M. 16,802; Galloway, Nov. 1683, M. 16,805.

(*k*) Peiry, 9th Jan. 1628, M. 16,801; Stewart, 25th June 1670, 2 B. S. 475; Ker, 20th Jan. 1693, M. 16,805; E. of Traquair, Feb. 1723, 16,810; Weirs, 22d June 1813, F. C. See Houston, 20th Jan. 1631, M. 16,801; E. of Traquair, 16th Dec. 1724, M. 16,809.

(*l*) Din *v.* Gillies, 18th June 1812; note to case of Weirs, 22d June 1813, F. C.

(*m*) Couts, 21st June 1681, M. 12,601.

(*n*) See Falconer, 9th Jan. 1751, M. 16,817; E. of March, 16th Dec. 1735, 5 B. S. 840; Ross's Trustees, 3d July 1792, M. 16,853.

(*o*) E. of Fife, 30th Nov. 1819, as reversed 17th July 1823, 1 Shaw's App. 298.

(*p*) E. of Fife, above.

11. SUBSCRIPTION BY THE INTERVENTION OF NOTARIES.—The statutes of 1579 and 1681, in so far as they relate to subscription by notaries, make provision for the case of persons who cannot write. Amongst these may be fairly classed such as can only write the initial letters of their name and surname. Subscription by the intervention of notaries is that of mandataries of the principal party; and the ordinary rules of attestation receive effect, combined with those which are necessary to ensure the due communication of authority to the notaries.

1. *The notaries ought to know the party.*—Notaries are, by an Act of Sederunt dated 21st July 1689, prohibited and discharged from subscribing for persons who cannot write, unless their identity consist with the knowledge of the notaries, or be attested by the instrumentary witnesses, or other credible persons whose names must be mentioned in the doquet.

2. *Reading of the deed.*—The deed ought, in the first instance, to be read over to the party in presence of the witnesses, although this ceremony is not required *de solemnitate* (*a*). It is a convenient mode of preserving evidence that it is the deed of the party.

3. *Warrant to the notaries.*—The party must, in the next place, evidence the giving warrant to each of the notaries, by touching his pen. It is not, however, essential that the notary shall describe this proceeding in his doquet (*b*), but only that he state that warrant was given (*c*). Where the notaries adhibit separate doquets, the rule applies to each, and that although the deed itself may bear that the party gave warrant to them to subscribe for him (*d*). Where a marginal note occurs on the deed, the doquet must bear that the warrant extended to this addition (*e*).

4. *Form of subscription.*—(1.) Warrant having been duly given, a doquet is subjoined by the notaries in the handwriting of one of them, in which they are described as notaries-public, and co-notaries in the premises. Each afterwards subscribes on all the pages of the deed his motto, name and surname, adding the initial letters N. P., and their subscriptions must be adhibited *unico contextu* with those of the witnesses. (See § 16). The deed itself is closed with a testing

clause in the ordinary form, containing, however, the names and designations of four in place of only two instrumentary witnesses. The statement in the doquet, of the party's declaration of his inability to write, is probative only of the fact of such declaration having been made; and as it cannot establish the inability, it appears to be no essential part of the doquet. The safe course, however, for the conveyancer is to be guided by the practice, and to insert, not merely the declaration of the party, but the cause of the inability, whether illness or ignorance. (2.) It has been questioned, if a deed duly subscribed by notaries at the desire of the granter, may be set aside on evidence of his ability to write his name. It may be doubted if the party may himself except on that ground to a deed so executed (*g*); and it seems to be held that third parties cannot effectually plead the statutes of 1540 and 1579, which declare that all writs shall be subscribed by the parties themselves, if they can subscribe, without at least challenging the deed as false (*h*).

5. *Parish ministers.*—Parish ministers may officiate as notaries in their own parishes in the authentication of testaments, but not for the inhabitants of other parishes, unless in the absence from the parish of its own minister (*i*).

6. *Disqualification.*—(1.) It does not appear that relationship, however close, disqualifies a notary-public, but he cannot act in matters where he has a personal interest (*k*). The same person cannot both subscribe a deed as a party, and competently represent another, as notary, in executing it (*l*); nor can a notary act for more than one of the parties to a mutual contract (*m*).

(*a*) Bell on Testing of Deeds, p. 199 and 228; Yorkstoun, 2d Dec. 1794, M. 16,856.

(*b*) Dallas, 13th Jan. 1704, M. 16,839 and 5677; Maver, 7th July 1710, M. 16,841.

(*c*) Williamson, 23d Feb. 1688, M. 16,838; Mackenzie, Feb. 1688, M. 16,838.

(*d*) Birrel, 17th June 1745, M. 16,846, and Elch. *voce* Writ, 19.

(*e*) Elliots, 9th Dec. 1695, M. 16,838.

(*f*) We A. B. and C. D., notaries-public and co-notaries in the premises, at the desire of the before named and designed E. F., who declares he cannot write by reason of, (state the cause,) and he having, in token of his warrant and authority to us, touched each of our pens respectively, in presence of the witnesses

before named and designed, do subscribe for him, before and in presence of the said witnesses.

(*g*) See Littlejohn, 8th Dec. 1608, M. 16,828.

(*h*) Clerk, 3d Jan. 1683, M. 16,837; Reid, 19th Dec. 1837, D. 16. 273. See Reid, 7th July 1835, F. C. and S. 13. 1063.

(*i*) 1584, c. 133. Hepburn, 31st Jan. 1606, M. 16,827.

(*k*) Leith Bank, 22d Jan. 1836, D. 14. 332. See Cheap, 14th June 1667, B. S. 1. 544.

(*l*) Gormock, April 1583, M. 16,874.

(*m*) Craig, 27th June 1610, M. 16,829.

12. MUST EVERY PAGE BE SUBSCRIBED?—The provision of the act of 1695, that every page shall be signed as the margins were when deeds were engrossed on sheets battered together, has not been regarded by the Court as imperative. When a deed consists of two or more pages written on a single sheet of paper, subscription on the last page has been held sufficient (*a*). (See § 3, Art. 3.) The letter, although perhaps not the spirit, of the enactment, has thus been disregarded.

(*a*) Williamson, 12th Dec. 1742, M. 16,933; Smith, 4th July 1816, F. C.

13. INSTRUMENTARY WITNESSES.—1. *Who may be witnesses.*—The rules regarding the competency of instrumentary witnesses in the attestation of deeds, differ materially from those which regulate the admissibility of witnesses to give evidence in courts of justice. Generally it may be observed, that any male of the age of fourteen or upwards becomes a habile witness by the request of the granter of a unilateral deed, or by the mutual consent of the parties to a contract or other bilateral or multilateral deed (*a*). A person even infamous in the eye of law has, in this latter situation, been found unexceptionable (*b*); and it is customary for parties to call in their nearest relations to witness their subscriptions, against whom no objection is understood to lie, if they do not benefit by the deed. A large interest on the part of a witness in the subject-matter renders the deed invalid, but not a mere legacy of an inconsiderable amount (*c*). In a practical view, interest, however trifling, ought to induce the rejection of a person as a witness.

2. *They must know the party.*—The knowledge by the

instrumentary witnesses of the identity of the party is a statutory requisite, and credible information at least is required on their part (*d*).

3. *They ought to see the party subscribe.*—It may be laid down as a rule of practice, that the subscription of the party must be adhibited in presence of the instrumentary witnesses, although it is sufficient that they hear him acknowledge it to be his. The witnesses to the subscription of the party are, according to invariable practice, two in number. They must have a warrant for their own subscriptions as such, beyond mere private knowledge of the handwriting of the party, which is necessarily excluded by the terms of the act of 1681. Although the statute provides only for the punishment of persons who sign as witnesses contravening its provisions, and does not declare the nullity of the deed, it is manifest that those only who have seen the party subscribe, or heard his acknowledgment, are witnesses in the proper sense of the term. The nullity, therefore, which is directed against deeds in which the witnesses are not designed, comes thus indirectly into operation; and the fact of witnessing the subscription, or the acknowledgment of the party, is regarded as a solemnity not to be supplied even by an admission of the genuineness of that subscription (*e*).

4. *Must sign unico contextu with the party.*—(1.) Witnesses subscribe on the last page only, and they ought to subscribe at the same time with the party (*f*). The deed being incomplete until their names are adhibited, a considerable interval between the subscription of the party and their subscribing, may leave room for the averment that he had withdrawn his consent before the deed was perfected; but it is not essential that the subscriptions of the witnesses should be added in his presence, or that the deed should not have been lost sight of by them in the interval (*g*). Nor is it a valid objection, that the witnesses subscribe at different times, the request of the party made to each, although on separate occasions, connecting the one operation with the other (*h*). Any deviation from the ordinary practice, is, however, to be carefully avoided, as subjecting the deed to suspicion; and it is not to be doubted that a delay to

complete the deed until another day had commenced, would be fatal. (2.) Each of the witnesses, in subscribing, adds the word "witness" to his name, and they are thus connected with the description in the testing clause. This addition, although not a statutory requisite, ought to be carefully attended to in practice. It marks, in the handwriting of the witness, the character in which he assists in the authentication of the deed; and without this holograph declaration of his character, a question might arise, if a person, although designed in the testing clause as a witness, would be subject to the penalties imposed by the statutes (*i*). (3.) A witness cannot authorise another person to subscribe for him (*k*); and it has been found that a witness to the execution of a summons, must be capable of subscribing at length, and not merely by initials (*l*). There seems no reason to doubt that this rule applies to an instrumentary witness in a deed. It would be highly inexpedient to admit any person as such, who cannot fully and formally subscribe his name.

5. *Witnesses to subscription by notaries.* — Warrant having been duly given by the party to notaries to subscribe for him, and the doquet written by one of them, the witnesses, who are four in number (*m*), must subscribe at the same time and place with the notaries; for the reason that one and all of the witnesses attest not merely the giving of authority to each of the notaries, but likewise his actual subscription under that authority (*n*). This rule will not be disregarded, even on the admission of the party, that he gave warrant to the notaries (*o*). The witnesses must hear the party authorise the notaries, or see him do so by touching the pen of each (*p*). Where the person signing by the intervention of notaries, is one of several parties to a deed, and the deed is executed by all of them at the same time, it is sufficient that the witnesses subscribe once, as attesting the execution of the deed by those who can, and by the person who cannot write (*q*).

6. *Witnesses attest the subscription only.*—Instrumentary witnesses in deeds are called to attest merely the subscription of the party, and they need not be informed of the contents of the writ (*r*).

7. *Evidence in reductions.*—When a probative writ is challenged as false, the Court are very guarded in receiving evidence to overcome the presumption in its favour; but the testimony of the instrumentary witnesses is admissible, although not conclusive (*s*). It is thus a relevant inquiry if the witnesses, or one of them, did not see the party subscribe, or hear him acknowledge his subscription; but a *non memini*—a want of recollection—on the part of the witnesses, or even the direct testimony of a single witness, will not affect the deed (*t*). Indeed, the leaning in modern practice seems rather to be against the credibility of the instrumentary witnesses when their testimony contradicts their solemn written attestation, unless it be supported by other and unexceptionable evidence (*u*).

(*a*) Ersk. 4. 2. 27; Davidson, 12th Dec. 1738, M. 16,899.

(*b*) Baillie, 1st Feb. 1710, M. 16,891.

(*c*) Ersk. as above. Robertson, 21st Nov. 1627, M. 16,879; Graham, March 1685, M. 16,887; Ingram, 22d Jan. 1801, M. App. *voce* Writ, No. 2.

(*d*) 1681, c. 5, above, p. 9; Campbell, 29th Nov. 1698, M. 16,887; Walker, 6th June 1716, M. 16,896.

(*e*) Duff, 22d Dec. 1825, F. C.; S. 4. 335; affirmed, 22d May 1826, W. S. 2. 166. The authority of Smith, 4th July 1816, F. C. disregarded.

(*f*) Hume, June 1730, M. 16,898.

(*g*) Frank, 3d March 1795, M. 16,824.

(*h*) Robertson, 1st Dec. 1823, S. 2. 544.

(*i*) See Bell on Execution of Deeds, 288; Gibson, 16th June 1809, F. C.; Doig, 9th Jan. 1741, M. 16,900; Wemyss, 5th June 1821, S. 1. 47; affirmed, 1 W. S. 140.

(*k*) Setton, 24th Feb. 1816, 1 Mur. 9.

(*l*) Meek, 18th June 1707, M. 16,806.

(*m*) 1579, c. 80, above, p. 7.

(*n*) Anderson, 24th Dec. 1709, M. 6843 and 16,840; White, 27th Dec. 1711, M. 16,841.

(*o*) Rollands, 1st July 1767, M. 16,851.

(*p*) 1681, c. 5; Farmers, 25th June 1760, M. 16,849.

(*q*) Hardie, 6th Dec. 1810, F. C.

(*r*) Lady Ormiston, Jan. 1708, M. 16,890.

(*s*) Balfour, Bell's Lectures, p. 246; Frank, 9th July 1795, M. 16,824; Swany, 12th Dec. 1807, M. App. Writ, 7; Condie, 26th June 1823, F. C. and S. 2. 432.

(*t*) Sim, 23d Nov. 1708, M. 16,891; Young, 2d Aug. 1770, M. 16,905; Sibbald, 18th Jan. 1776, M. 16,906; Cleland, 6th July 1837, D. 15. 1246.

(*u*) Frank, 3d March 1795, M. 16,824; Richardson, 28th Feb. 1811, F. C. Condie, as above.

14. TESTING CLAUSE (*a*).—1. *Time of insertion.*—This part of the deed contains the record of the *res gestæ* and other important particulars connected with its execution. Its insertion is in the ordinary case an *ex post facto* operation, and depends for its accuracy wholly upon the conveyancer. This loose practice is caused by the exigencies of business, many important deeds being engrossed in Edinburgh, and sent for execution to the country, whence they are returned with a note of the particulars of the date, and names and designations of the witnesses, and from this note the testing clause is framed and filled up by the writer of the deed. Necessity is plainly the only apology for the custom; and when a deed is executed at the place where it has been engrossed, the clause ought to be filled up before subscription. A testing clause, inserted after an interval, can have no pretensions to the character of a probative writing, and ought therefore to be strictly confined to those particulars of which it is necessarily the record. When so limited, it may competently be filled up, or even corrected, after a long period, if prior to the production of the deed in evidence, or for the purpose of being recorded. In a recent case, the operation had been performed at the distance of thirty-two years (*b*). It is not a valid objection that the clause so filled up is crowded, or even that it extends *below*, if not *under*, the subscriptions (*c*). The laxity of practice indicated by the occurrence of such cases is carefully to be avoided. Their decision plainly depends upon circumstances; and the conveyancer ought by no means to calculate on similar views being entertained, even in similar circumstances.

2. *Number of pages.*—The testing clause records, in the first place, the number of pages of which the deed consists, in obedience to the provisions of the act of 1696 (*d*), which permits the making up of deeds by way of book. But the Court have dispensed with this form in the case of deeds written on a single sheet of paper, which, as regards the subscription of the party, and the provision of the statute, are considered to be one continued piece of writing (*e*).

3. *Mention of the writer.*—In the next place, and before the designations of the witnesses, is inserted the de-

signation of the writer of the deed, in terms of the statutes of 1593 and 1681. (See § 7, 8.) By the latter statute, the Legislature took away the power assumed by the Court, of allowing the name and designation of the writer to be supplied by a condescendence; but, as the terms of the former statute were not interfered with, and these make mention only of the writer of the body of the deed, there is no existing injunction to insert the writer of the names and designations of the witnesses (*f*). Nor is it necessary that the name and designation of the writer of the body of the deed should be inserted in his own handwriting (*g*). Where a deed is partly printed and partly written, it has been held a sufficient compliance with the statute, to describe the person who fills up the blanks left for the substantial parts (*h*). The modern practice, with respect to the mention of the writer, extends to the writer of the testing clause, when it is inserted by a person different from the writer of the body of the deed; and the safe course for the conveyancer is to be guided by the practice.

4. *Designation of the writer.*—(1.) The insertion of the writer's name, surname, dwelling-place, and other denomination, being a statutory solemnity, it is of importance that these should be fully given, so as to exclude all question as to identity. (See Art. 6.) The sufficiency of the designation must depend upon the circumstances of each individual case. Such vague additions as "notary," and "writer," although they have been sustained in favourable circumstances (*i*), are to be carefully avoided. More recently, the Court refused to sustain a defective designation, although the writer was sufficiently known from the testing clause (*k*). (2.) It is not incongruous that the writer of the deed should be one of the instrumentary witnesses; and when his designation as a witness is complete, the addition of the words, "and writer "hereof," in his own handwriting, after the word witness subjoined to his subscription, has been held sufficient. It is, however, to be observed, that such a practice is in the face of the statute, which provides that the writer shall be mentioned *before the inserting of the witnesses* (*l*). (3.) The insertion of the name and designation of the writer being a statutory solemnity, its omission cannot be supplied by the

party acknowledging his subscription (*m*). (4.) It is a practical rule that the writer should have no interest, however slight, in the subject-matter of the deed.

5. *Date and place of subscribing.*—(1.) The mention in the testing clause of the date and place of subscribing is next in order. It is customary and highly useful, but not essential, although Lord Stair expresses a contrary opinion (*n*). Their omission may, however, throw suspicion upon the writ, and the burden of supporting it upon the user (*o*); and in the question of deathbed, he is deprived of the presumption afforded by the date being specified in the deed. (2.) The practice of executing deeds on a lawful day has been so invariable, that the question, how far a private writ dated upon a Sunday is valid in a question between competing parties, does not appear to have occurred. The objection, when urged by the debtor, was in one instance repelled; and, from favour to testamentary writings, they are sustained, although bearing to have been subscribed on a Sunday; at least the objection has been disregarded where the plea of deathbed was not stated (*p*).

6. *Designations of the witnesses.*—The testing clause proceeds to record the designations of the instrumentary witnesses, of which the insertion is a statutory solemnity, and the acknowledgment by the party of his subscription will not meet the objection that it has been neglected (*q*). (1.) Designation, in the sense of the act of 1681, means the distinctive description of the individual by Christian name and surname, joined with employment, residence, or some other mark of identity. The surname is of course essential; and it has been ruled that the Christian name is equally indispensable, although the witness may be otherwise sufficiently distinguished (*r*). The employment, residence or other descriptive mark, cannot be the subject of any precise rule. The addition, "indweller in Edinburgh," has been sustained, and that of "Esquire" rejected, although the one is scarcely more distinctive than the other (*s*). A material error, such as brother-german for brother-in-law, is fatal to the designation; and the designation, when complete, must precisely apply to the individual witness (*t*). (2.) It is not essential to add the word "witnesses" to the designations

of the instrumentary witnesses: their character is sufficiently indicated by the word "witness" subjoined to each of their subscriptions (*u*). (3.) Ambiguous expressions used in connecting the witnesses with the party's subscription are to be carefully avoided; although, where the circumstances are not suspicious, they will be favourably interpreted (*v*).

7. *Mention of marginal notes.*—(1.) The solemnities of the attestation of marginal notes or additions are not provided for by the statutes. In practice, additions are authenticated by the sidescription of the party, who writes his name or its initial letter above, and his surname under the addition, so as to embrace it between the two, and thus prevent the introduction of more words. Marginal notes seem, in our older practice, to have been regarded as forming part of the pages on which they occurred, when obviously written and sidescribed at the same time with the body of the writ, and do not appear to have been mentioned in the testing clause (*w*). In a case where the appearance of the addition was suspicious, and the instrumentary witnesses could not state that it formed part of the deed when executed, the objection of deathbed proved fatal to the addition (*x*). At a later period, it seems to have been assumed that the instrumentary witnesses must be mentioned as witnesses to the sidescription of a marginal addition (*y*). In practice, this rule applies both to the writer and the witnesses; and even this precaution is by some regarded as insufficient. The attention of witnesses is not usually called to marginal additions; and nothing can be more easy than to add and sidescribe words of the greatest importance on the margin of a deed *after* the attestation, but *prior* to the filling up of the testing clause. There would thus appear to be only one certain method of preventing fraudulent or *ex post facto* additions, the sidescription by the witnesses as well as the party of marginal notes. (2.) A fatal objection to a marginal addition does not necessarily affect the body of the deed (*z*).

8. *Mention of erasures.*—The effect of writing words on a part of the paper from which other words have been erased is noticed at § 21. It has been questioned (*aa*) if the testing clause is the proper place for recording an alteration of this description; and there is much room to doubt the ex-

pediency of receiving the mere assertion of the writer of the testing clause as evidence that the alteration or deletion had been made prior to subscription. The mode pointed out by Lord Stair (*bb*) might perhaps, with much advantage, be adopted in modern practice, of employing a marginal note to express the consent of the party to a deletion or superinduction, or words written on an erased part.

9. *Practical conclusions.*—The general results of the rules and forms which have been noticed seem to be these: (1.) Deeds ought to be written fairly and legibly, the pages being marked at the top with their proper numbers. (2.) When *deletions, erasures, or superinductions*, have, through mistake, become necessary, the safest mode is to notice them in a marginal note. (3.) The name and designation of the *writer* of the deed ought to be inserted before its execution; and where there is only one party, or, if more, when the parties reside in the same place, the writer ought, when practicable, to be present, in order that the testing clause may be filled up prior to their subscription. (4.) The *instrumentary witnesses* must be males of the age of fourteen or upwards; and they ought to be of known respectability, and in an ordinary degree acquainted with business. It is their duty to pay close attention to the proceedings, that they may be able to speak to the facts of the party having subscribed every page, as well as any marginal notes, in their presence, in the event of the deed becoming, at a future period, the subject of challenge. If notaries intervene, the duty of the witnesses farther extends to seeing the party give warrant to subscribe for him, by touching the pen of each of the notaries. The witnesses, in practice, subscribe only the last page of the deed, but the author would venture to recommend that they ought also to attest marginal notes with their subscriptions. The custom, not uncommon, of the party subscribing before the witnesses have been called in, and afterwards acknowledging each subscription to them, ought to be avoided, as well as subscription by the witnesses out of the presence of the party. No undue delay should take place in filling up the testing clause, when a blank has, from the number of the parties, and their residing at different places, or other cir-

cumstances, become necessary or convenient; and it is of importance that the designation of the witnesses required by statute should be full and distinctive, including profession or employment, and residence. (5.) The *place and date* of subscribing, although not essential, ought to be inserted, in order to exclude suspicion, and furnish, in competition with other deeds, or in a question of deathbed, the best evidence of the time of subscription. (6.) *Marginal additions* will be noticed by the number of the page, and of the line at which they occur. (7.) The name and distinctive designation of the *writer of the testing clause* ought to be mentioned, when it is inserted by a person not the writer of the deed. (8.) Erasures, or other vitiations in the testing clause, cannot be remedied, and, if in substantial parts, they will be fatal to the deed (*cc*). (9.) All matter foreign to the usual purposes of the testing clause ought carefully to be excluded.

(*a*) (Testing clause.) In witness whereof I have subscribed these presents, written upon this and the preceding page of stamped paper by A. B., clerk to C. D., writer to the signet, at Edinburgh, the day of eighteen hundred and thirty-eight years, before these witnesses, E. J. and G. H., both also clerks to the said C. D.

(*b*) Blair, 15th Nov. 1827, F. C.; S. 6. 51; Bank of Scotland, 17th Feb. 1790, M. 16,909. See Brown, 11th March 1809, F. C.

(*c*) Drury, 11th March 1753, M. 16,936.

(*d*) 1696, c. 15; above, p. 4.

(*e*) Robertson, January 1742, M. 16,955; Macdonald, 14th Feb. 1778, M. 16,956.

(*f*) Watson, Nov. 1683, M. 16,860; Gray, 21st Jan. 1703, M. 12,602; L. of Edmonston, 10th June 1722, M. 16,862. See Andrews, 2d March 1836, D. 14. 589, (Opinion of Lord Corehouse.)

(*g*) White, 21st Feb. 1710, M. 16,864.

(*h*) Stirling, 1st Dec. 1711, B. S. 4. 856; Creditors of Spot, 30th Nov. 1711, M. 16,868.

(*i*) M'Micken, 27th June 1706, M. 16,916; Rules, 20th Feb. 1712, M. 16,920.

(*k*) Lockhart, 16th Feb. 1815, F. C.

(*l*) Dronan, 26th July 1716, M. 16,869; Ewing, 20th July 1739, M. 1352; B. S. 5. 211.

(*m*) M'Farlane, 22d May 1790, M. 17,057.

(*n*) Ersk. 3. 2. 18; Wemyss, 5th June 1821, F. C.; 1 S. 47; affirmed, 1 W. S. 140. See Stair, 4. 42. 19.

(*o*) Crawford, 7th June 1666, M. 16,927.

(*p*) Duncan, March 1684, M. 15,003; Yeats, 6th July 1833, F. C., and S. 11. 915.

(*q*) 1681, c. 5; Russel, 17th Dec. 1766, M. 16,904.

(*r*) Abercromby, 15th July 1707, M. 17,022; Douglas and Co. 28th Nov. 1787, M. 16,908. See Bell on Testing of Deeds, p. 82-3.

(*s*) Grant, 29th Nov. 1698, M. 16,913; Humbie, 1st Dec. 1736; Elch. *voce* Writ, 3.

(*t*) Graham's Creditors, 26th Dec. 1752, M. 16,902; Halden, 9th Nov. 1714, M. 16,924, affirmed.

(*u*) Doig, 9th Jan. 1741, M. 16,900; Wemyss, as above.

(*v*) Orr, 14th Feb. 1712, M. 16,919; Gordon, 21st June 1765, M. 16,818; Wemyss, as above; Miller, 20th Feb. 1829, S. 7. 444, and F. C.

(*w*) See Cuming, 18th April 1721, Robertson's App. 364; Spottiswood, 17th June 1741, M. 16,811.

(*x*) Durie, 28th Feb. 1667, M. 16,927.

(*y*) See Broomfield, 7th Dec. 1752, M. 16,817.

(*z*) Johnstone, Feb. 1688, M. 17,063.

(*aa*) Reid, 7th March 1835, F. C. and S. B. 13. 619.

(*bb*) Stair, 4. 42. 19. See Bell on Testing of Deeds, 114.

(*cc*) See Gaywood, 19th June 1828, F. C. and C. S. 991.

15. WRITS DEFECTIVE IN THE SOLEMNITIES.—Connected intimately with this portion of our subject, is the question, how far writs defective in the solemnities of the statutes are capable of being supported or validated; and although not strictly falling within the scope of a work of a practical nature, it may be shortly adverted to. Prior to the statute of 1681, the bare fact of subscription having been regarded as the principal ingredient in the attestation of deeds, the solemnities of the existing statutes were in general allowed to be supplied by a reference of that fact, or when the party could not write, of the verity of his command to a notary to subscribe for him, to the oath of the granter of the deed (*a*). Even after the passing of the act, the decisions of the Court, although generally the other way, occasionally leaned towards the old rule (*b*), until towards the close of the last century, when the question appears to have been set at rest in a well considered case (*c*), where the evil of permitting the requisites of the statutes to be superseded by a reference to oath are clearly exposed. And as there seems to be no well-founded distinction between direct and notarial subscription, as regards the present question, although contended for in a case which gave rise to much ingenious discussion (*d*), the law may now, perhaps, on this point, be understood as settled, with respect to all classes of defective deeds (*e*). The

principles on which homologation and *rei interventus* operate, in subjecting parties to the obligations expressed in formal writs, are foreign to the object of this work.

(*a*) Weir, 29th Nov. 1609, M. 17,011; Sheriff, 8th July 1623, M. 17,012; L. of Redpath, 23d June 1611, M. 17,011.

(*b*) Ersk. 3. 2. 19; Beatie, 26th Dec. 1695, M. 17,021.

(*c*) Grieve, 22d May 1790, M. 8459; Hailes, 1080.

(*d*) Crosbie, 4th July 1735, M. 17,033 and 16,842; B. S. 5. 210 and 667; Elch. Writ, 8.

(*e*) See Bell's Conv. of Land, p. 145, note.

16. EXCEPTIONS FROM THE RULES OF ATTESTATION.—The statutory regulations of our system of authentication are not universally applicable, but are superseded with respect to certain classes of writs, with few of which has our subject any connection. These exceptions have been introduced upon principles derived from the necessities of commercial intercourse,—such as bills, missive letters and accounts; from the texture of the writ,—such as holograph deeds; or from favour to agriculture,—such as receipts to tenants. With respect to the first class of exceptions, it is manifest that the multiplied transactions of banking, commercial and manufacturing business, could not be carried on to advantage, exposed to the delays and formalities attending the preparation and execution of perfect deeds; and thus the relaxation of the rules of attestation in favour of bills and other writs *in re mercatoria*, is essential to the very existence of commercial intercourse on an extended scale. The last class of exceptions is necessary for the protection of rustic and uneducated persons, who are not supposed to look beyond the fact of their discharges being subscribed with the well-known name of their landlord or his factor; and the second class of writs have been excepted by immemorial usage as above all suspicion, and therefore presumed to be excluded from the operation of statutes which were enacted for the protection of the lieges against forgery, fraud and circumvention, none of which can be suspected of a deed in the granter's own handwriting. Of these writings, it must however be remarked, that, (with the exception of inland bills and bills of exchange,) they are privileged to no greater degree, than as capable of being supported by parole

evidence, where the genuineness of the subscription, or the fact of holograph, is denied.

17. HOLOGRAPH DEEDS.—1. *Subscription and proof.*—Holograph deeds form the only class of privileged writings with which the feudal conveyancer has any concern. (1.) It is not an essential solemnity of a holograph writ, that it bear the subscription of the party, if it plainly appear from intrinsic evidence, or that of relative formal documents, that it is a completed writing (*a*); but the subscription of the name of the party, or at least its insertion in some part of the writing, would probably be considered indispensable (*b*). Where the writ is not connected with other relative documents, subscription is necessary to shew that the granter put it out of his hands as a finished document by which he intended to be bound. (2.) It is not essential that the whole body of the writ, but only the substantial parts, such, for example, as the sum and the name of the debtor in a bond, should be holograph (*c*); and, on the other hand, a writing holograph except in a substantial part is not privileged (*d*). When the fact of holograph and the subscription are denied, it seems questionable if the mere statement in the deed itself is to be taken, even as *prima facie* evidence, to connect the party with the writing (*e*).

2. *Date.*—It is a question of much importance in a practical view, what faith is due to the mention of a date in a holograph unattested writ, as that on which it was executed; and it seems to be clearly ascertained, that it proves its date as against the party founding upon it only (*f*). But although an heir is entitled to the presumption that unattested holograph deeds, which directly affect the heritable estate of the ancestor, were granted on deathbed, the user of the deed has been allowed to elide the presumption by contrary evidence (*g*). Where the question of deathbed is not involved, it is irrelevant to allege that a holograph unattested testamentary deed bears a false date (*h*). It is thus manifest, that the custom of unskilful persons writing their own settlements or other deeds of importance, is attended with great risk to the objects which they have in view, and it often gives rise to vexatious questions.

(*a*) Currence, June 1688, B. S. 2. 121; Paterson, 10th July 1717, M. 9441; Gillespie, 22d Dec. 1831, F. C. and S. 10. 174.

(*b*) See Gillespie, as above.

(*c*) Vans, 23d Jan. 1675, M. 16,885; but the authority may require confirmation.

(*d*) Heriot, Nov. 1681, M. 17,020.

(*e*) Donaldson, 12th June 1711, M. 11,511; Ellies, 1st July 1630, B. S. 1. 312; Inglis, 1st July 1631, M. 16,962; A. and B. 21st Dec. 1638, B. S. 1. 103; but see Ersk. 3. 2. 22, and E. of Rothes, 9th Dec. 1635, M. 12,605. This case appears to have been decided in circumstances extremely favourable to the deed.

(*f*) E. of Dunfermline, Jan. 1674, 1 B. S. 703; Bell, 20th Jan. 1672, M. 12,607; B. S. 2. 158.

(*g*) Ross, 27th June 1699, M. 12,612; Graham, 19th Feb. 1703, M. 12,614.

(*h*) Yeats, 6th July 1833, F. C. and S. 11. 915.

18. DEEDS SUBSCRIBED BY A NUMBER OF PERSONS.—It is stated by Mr Erskine (*a*), that deeds signed by a number of persons, members of a corporate body, or even private individuals, have been adjudged effectual without witnesses, the parties being presumed to have been witnesses to each other's subscription. It may, however, be doubted if the cases (*b*) to which that learned author refers support the doctrine. They are at least at variance with an authority of more recent date (*c*); and there seems no ground for holding that the statutes give any countenance to the notion, that persons can be both parties and witnesses in one and the same deed (*d*).

(*a*) Ersk. 3. 2. 23.

(*b*) Forest, 19th July 1676, M. 16,970; Seabox of Queensferry, 7th Jan. 1732, M. 16,899.

(*c*) D. of Douglas, Nov. 1742, and 7th Jan. 1747, M. 17,033-5; Elch. Writ, 11; B. S. 5. 744.

(*d*) The point has been ruled contrary to Mr Erskine's opinion by Miller, 29th May 1835, F. C. and S. 13. 838.

19. DELIVERY OF DEEDS.—The subject of the delivery of deeds is not strictly comprehended under that of their form and authentication; but as a preliminary which it is the duty of the practitioner to regard, it may be here briefly noticed. The rule is, that deeds which do not contain mutual stipulations or obligations, (called *unilateral*,) must, to be binding on

the granter, be delivered to the grantee, or to a third person for his behoof. But no ceremony is required. It is sufficient that the deed be in the lawful custody of the person in whose hands it is found. In doubtful cases, a third person is presumed to hold for the granter, when the deed is gratuitous, and for the grantee when onerous. The agent or doer of the granter is not accounted a third person, even where, as a trustee, he is one of those to whom the deed is granted; he holds his client's documents on his account.

Erak. 3. 2. 43-44; Bell's Princ. 22-24. See Ramsay, 11th July 1833, F. C., and 11 S. 967.

20. DEEDS VALID WITHOUT DELIVERY.—1. *Deeds inter vivos.*—Mutual deeds or contracts, (called *bilateral* or *multilateral*,) may be considered incapable of delivery, and are valid in whosoever custody they are found. Deeds in which the granter has an interest, *e. g.* a conveyance with a reserved liferent, are effectual without delivery; as are those which the granter lies under an obligation to execute; and deeds in favour of children are presumed to be held by the parent for their behoof.

2. *Deeds mortis causa.*—Testamentary deeds are valid although found in the repositories of the granter after his death. Settlements containing a clause dispensing with their delivery, are presumed to have been executed with the intention of their having immediate effect as completed and binding deeds, and only retained in order to be in the power of the granter during his lifetime. So long, therefore, as they continue in his possession, they are revocable without a reserved faculty.

3. *Equivalent.*—Registration in a public register for preservation or execution, is equivalent to delivery. Caution must therefore be exercised in recording entails, or other deeds of settlement, during the granter's lifetime, unless a power to revoke is reserved.

Erak. 3. 2. 43-4; Bell's Princ. 22-24. See Ramsay, 11th July 1833, F. C., and S. 11. 967.

TITLE III. OFFICIAL WRITS.

21. NOTARIAL INSTRUMENTS.—The writs which are here termed official hold a middle place between public and private writs. (1.) Notarial instruments are attested by the subscriptions of a notary and two witnesses. The designation of the witnesses in the body of the writ, in instruments of sasine and of resignation *ad remanentiam*, depends upon the provisions of the statute of 1681, and is subject to the same rules as in private deeds. (Above, § 14, Art. 6.) The notary subjoins, on the last page of the instrument, what is styled his long doquet (*a*), and he subscribes his motto, name and surname, with the addition of the letters N. P., as the initials of *Notarius Publicus*. (2.) Instruments of sasine and resignation appear to have, from the earliest times, been subscribed by only one notary; and in order to exclude them from the operation of the act of 1579 (*b*), which requires two notaries and four witnesses in the attestation of writs of importance for parties who cannot write, a clause was inserted in a subsequent statute (*c*), to the effect that the provisions of the former should not extend to instruments of sasine, in attesting which, one faithful notary, with a *reasonable number of honest and famous witnesses*, should be sufficient. Two witnesses have accordingly been sustained as a sufficient number under this enactment (*d*), a result produced by the practical inconvenience of obtaining the presence and subscriptions of four witnesses (*e*). Custom has extended the rule thus established to all other important notarial writs; and as these are but supplemental, and mere testificates of facts and ceremonies authorised by other deeds, there is not the same reason for the employment of a large number of official persons and witnesses in the attestation of sasines and the like, as in the execution of original documents for infirm or illiterate persons.

(*a*) Et ego vero A. B. clericus Edinburgensis Diocesios ac Notarius Publicus auctoritate regali ac per Dominos Concilii et Sessionis secundum tenorem Acti Parliamenti admissus Quia præmissis omnibus et singulis dum sic ut præmittitur dicerentur agerentur et fierent una cum prænominatis testibus præsens personaliter interfui eaque omnia et singula præmissa sic fieri et dici vidi scivi et

audivi ac in notam cepi Ideoque hoc præsens publicum Instrumentum manu mea (vel aliena) (vel partim manu mea partim aliena) super hanc et præcedentes paginas pergamenæ debite impressæ fideliter scriptum exinde confeci et in hanc publici Instrumenti formam redegi signoque nomine et cognomine meis solitis et consuetis signavi et subscripsi in fidem robur et testimonium veritatis omnium et singulorum præmissorum rogatus et requisitus *(sic subscribitur.)* Juravi. A. B., *N. P.*

(*b*) 1579, c. 80, above, p. 7.

(*c*) 1584, c. 4, above, p. 8.

(*d*) Ersk. 2. 3. 15; Bishop of Aberdeen, 15th July 1680, M. 3011; A. v. B. 1st Feb. 1673, B. S. 4. 60.

(*e*) Dallas, p. 38.

22. SOLEMNITIES OF SASINES, &c.—1. *Form.*—Sasines and instruments of resignation were anciently written upon the face of a sheet of parchment, to whatever length the deed might extend, and this form of engrossing may still be followed. (1.) It is made lawful by statute (*a*) for parties to cause write and extend their sasines by way of book, the attestation or doquet of the notary containing the number of the leaves in the book, and each leaf being subscribed by the notary and witnesses. The permissive clause of this statute was adopted, without regard, however, to the corresponding injunctions, and the act was, in effect, held to be repealed by the subsequent statute of 1696, permitting private deeds to be written bookwise, under certain provisions, one of which is that the witnesses shall subscribe on the last page. The objection to a sasine, that the witnesses had signed on the last page only, was accordingly, in repeated instances, disregarded (*b*). The injunction, that the notary should specify in his doquet the number of leaves of which the writ consisted, fell likewise into neglect; and the Court sustained sasines not in conformity with the terms of the statute, in respect of the inveterate practice (*c*). (2.) In order to remedy evils thus arising out of an erroneous interpretation of the act of 1696, which in no respect relates to notarial writs, the Court, by Act of Sederunt (*d*), required obedience to the provisions of the act of 1686, and farther enjoined that all sasines should be marked on the pages with the numbers *one*, *two*, &c. as provided by the act of 1696 with respect to private writs.

2. *Subscription.*—Instruments of sasine and resignation are now, in practice, attested by the subscriptions of the notary

and witnesses on every page, although this is necessary only on each leaf (*e*), or, when the deed consists of one sheet, on the last page (*f*).

3. *Doquet.*—The attestation or doquet of the notary must express the number of leaves of which the deed consists (*g*), and practice has extended the provision to the number of pages. But when the deed consists of only one page, the mention of that fact is not held to be a solemnity (*h*). An error in the number is carefully to be avoided. If stated to be less than the true number, the instrument would in all probability be set aside, as not duly authenticated; and if greater, the result will much depend upon the appearance of the document (*i*). It is customary to express in it that the deed is written by the notary himself, or by another, or partly with his own hand and partly with another hand; but as this is not a statutory solemnity, an objection, that material words had been inserted by the notary himself, although he attested that the deed was written by another, was repelled (*k*). The doquet is the proper place for referring to deletions in the body of the instrument, which ought to be noticed by the line and the number of words deleted. The terms of the doquet, as connected with the ceremony of infeftment, are noticed below.

(*a*) 1686, c. 17. Our Sovereign Lord taking into his consideration that seasins do extend to great length by reason of inserting and reppating of the whole provisions of the charter therein Therefor his Majesty with advice and consent of his Estates of Parliament, for the more easy and commodious perusal thereof statutes and ordains that it shall be lawful for parties if they think fit to cause write and extend their seasins by way of book, the attestation of the notar condescending upon the number of the leaves in the book, and each leaf being signed by the Notar and witnesses to the giving of the seasin And ratifies all seasins already written by way of book by warrand of his Majesty's Privy Council.

(*b*) E. of Finlater, June 1716, M. 16,954; Duff, &c. *v.* E. of Buchan, Jan. 1725, M. 16,955, (but reversed); D. of Hamilton, 9th Dec. 1762, M. 16,956; Ersk. 3. 2. 16.

(*c*) D. of Roxburghe, 17th July 1741, M. 14,332; Clerk and Waddell, 7th Feb. 1752, M. 14,333.

(*d*) A. of S. 17th January 1756.

(*e*) 1686, c. 17, as above; Carnegie, 26th Feb. 1796, M. 8858.

(*f*) Kirkham, 21st May 1822, S. 1. 423.

(*g*) 1686, c. 17, as above. See page 30.

(*h*) Morison, 16th Dec. 1826, F. C., S. 5. 150.

(*i*) Dickson, 3d March 1829, F. C., S. 7. 503.

(*k*) Dickson, 24th Feb. 1801, M. App. Tailzie, No. 7.

TITLE III. VITIATIONS IN WRITS.

23. ERASURES, &c.—1. *Vitiation by erasure and deletion.*—(1.) The rules with respect to vitiations affect equally all classes of writs, with the exception of notarial instruments. The presumption is against the validity of deeds liable to the objection of vitiation; as a writing, to be above suspicion, must, from its very nature, be engrossed on an undefaced substance, and complete in itself (*a*). Vitiations, according to Lord Stair (*b*), are of three kinds; by deletion, rasing, and superinduction; which last consists not only in adding or altering letters, but in introducing monosyllables, or short words, between other words. The worst kind of deletion, (his Lordship observes,) is when the words scored out cannot be read. They are presumed to have been *in substantialibus*, unless the contrary appear by what precedes or follows. Of rasing, he says, that it is more incident to writs on parchment than on paper; but in practice, it is to be feared there is too much in both kinds, and questions of a highly vexatious nature thence frequently arise. (2.) At an early period, when fraud was not alleged, the words vitiated were generally allowed to be supplied by the evidence of the testamentary witnesses (*c*). More recently, the leaning was the other way, and a vitiation even in the date, which is not a statutory requisite, was held fatal to the deed (*d*). (3.) The principle is now however received, that each and every word of a probative deed is in itself probative; and the rule has, in several recent instances, been followed, to exclude words introduced between other words, and likewise words deleted or written on erased parts, from the tenor of the writ, which is read without them, and when these are not essential, and no presumption can exist that the erased words were material, to support the deed (*e*). Courts must, in the general case, decide upon such questions from the appearance of the writ, and without having any light thrown upon the import of the words deleted or erased, when they have been wholly defaced, except by the context; and if it shall not thence clearly appear that the words were immaterial, it seems the safer course to adopt Lord Stair's rule, and reject the deed as vitiated *in substantia-*

libus. There can exist no apology for vitiations. A deed accidentally blundered may be again engrossed prior to its execution, and where time presses, there is a remedy well known to the practitioner; (above, § 14, Art. 8, 9). The question may assume another and a very different shape where an allegation is deliberately made that erasures have occurred through the fraudulent interference or connivance of the party objecting to the deed, or deletions have been caused by mere accident. For such cases a remedy ought to be provided; but, in ordinary circumstances, it is plainly for the ultimate advantage of practitioners, as well as of their employers, that the strict rule should be enforced. (4.) The vitiation, or accidental cancellation, of a substantial part, such as the name of an instrumentary witness, or of a disponee, is thus fatal to the deed (*f*); for the instrumentary witnesses are not now admissible to verify words appearing on erasures (*g*), although reference to the oath of the granter, that they were so written prior to his subscribing the deed, seems to be competent (*h*). When deeds are executed in duplicate, it has been thought that words written on erasures in one of the copies might receive support from the other copy, if undefaced; but to justify the conclusion, that the duplicates are identical in tenor, it is plainly essential that no presumption shall exist of the words erased having been material (*i*). See § 14, Art. 8.

2. *Interlineations.*—Words added between the lines in a deed are not objectionable, when they only make up the sense. In other respects they are regarded as forming no part of the deed (*k*).

3. *Blanks.*—Spaces occurring in deeds, on which no words are written, or scores made with the pen, are of a more dangerous nature than vitiations by deletion, erasure or superinduction, as in these cases, the paper being damaged or defaced, or the writing crowded, the alteration is easily perceived; whereas a blank may be filled up at a distance of time, with the same hand, in such a manner as to elude observation. When blanks, in important clauses, have obviously been filled up after the execution of the deed, it is read without the words thus inserted; and the presumption is, that they were so filled up, if in a handwriting different from that of the writer

of the deed, or in different ink, unless the inserter of the date, place and witnesses shall have mentioned in the testing clause that they were filled up by him (*l*). But the Court will not, on slight grounds, entertain an allegation that a deed *ex facie* probative was blank in an essential part at the time of subscribing (*m*). It follows, that where blanks are filled up at that period, by one who is not the writer of the body of the deed, his name and designation, as the writer of the parts so filled in, ought to be inserted by himself in the testing clause (*n*).

(*a*) Pitillo, 22d Nov. 1761, M. 11,536; E. of Bute, 18th July 1712, M. 11,545.

(*b*) Stair, 4. 42. 19.

(*c*) Arrol, Feb. 1730, M. 12,285.

(*d*) Merry, 6th Feb. 1801, M. App. Writ, 3; affirmed on appeal.

(*e*) Keir, Feb. 1597, M. 17,062; Kemps, 2d March 1802, M. 16,949; Adam, 12th June 1810, F. C.; Traquair, 26th June 1822, F. C., 1 S. 527; Morison, 30th June 1829, S. 7. 810.

(*f*) E. Bute, 18th July 1712, M. 11,545; Gibson, 16th June 1809, affirmed 20th April 1814, Dow, 2. 270; Reid, 7th March 1835, F. C. and S.

(*g*) Reid, 24th June 1834, F. C. and S.

(*h*) Erak. 3. 2. 20.

(*i*) Strathmore, 1st Feb. 1837, F. C. and D. 15. 449. It is to be observed that the case did not turn on this point, the erasures being considered immaterial.

(*k*) Stair, 4. 42. 19; Lyon, 21st Dec. 1709, M. 11,544.

(*l*) Stair, as above, Art. 4; Pentland, 22d May 1829, S. 7. 640. See Abernethie, 16th Jan. 1835, S.

(*m*) Baillie, 25th June 1828, S. 6. 1016.

(*n*) 1593, c. 179; 1681, c. 5; above, p. 8, 9; Stair, as above.

24. ERASURES IN SASINES, &c.—Erasures and other imperfections in notarial writs may be remedied by engrossing them of new; for being testificates of antecedent facts, they may be written and subscribed at any period prior to being produced judicially, or presented for registration. Until a very recent date, sasines containing vitiations in substantial parts were, after registration, subject to the same objections as other deeds (*a*). But, by a late enactment (*b*), it is declared that no challenge of any sasine, or instrument of resignation *ad remanentiam*, shall receive effect either by reduction or exception, on the ground that any part of the instrument is written on an erasure, unless it shall be averred and proved

that such erasure had been made for the purpose of fraud, or the record is not conformable to the instrument as presented for registration. Instruments of sasine *propriis manibus*, and instruments of resignation and sasine *propriis manibus* in burgage subjects, are excepted from the enactment. The statute has a retrospect so as to exclude all actions wherein judgment was not pronounced prior to the 12th of May 1835. Words appearing, on the face of the instrument, to be written on erasures, and not transcribed into the register, will thus be presumed to have been so written after the time of recording. As the statute relates to vitiations by erasure only, deletions ought to be mentioned in the doquet; (above, § 22, 3.) It is remarkable, that the strongest argument for the passing of this salutary statute, that the identity in terms of the writ and the record exclude suspicion, was successfully employed in support of the execution of an inhibition wherein a word appeared interlined. It was maintained, "that in the regis-"ter it is fair and clear, which proves that it is not a vitiation "made since recording (*c*)." Words written upon erasures in instruments of sasine and resignation *ad remanentiam* are therefore read as part of the writ, if they appear on the record, in the same manner as if the substance on which it is written had not been defaced. Errors in the register had the same effect as when they occurred in the instrument itself, and this rule remains unaltered. The remedy is by new infeftment, and the registration of the instrument following upon it.

(*a*) Innes, 10th March 1827, F. C., S. 5. 559, affirmed, 2 W. S. 637; Hoggan, 13th Feb. 1835, F. C., S.; Howden, 10th July 1835, S. See M'Millan, 4th March 1831, F. C. and S. 9. 551.

(*b*) 6 and 7 Gul. IV. c. 33, (14th July 1836). Whereas an act of the Parliament of Scotland, passed in the year 1617, intituled, *Anent the Registration of Reversions, Sasines and other Writs*, for the purpose of establishing certain public registers, in which the various sorts of writings affecting heritable property therein enumerated or referred to, were to be made patent to the lieges; and by two other acts of the Parliament of Scotland, passed in the years 1669 and 1681, the provisions in the foresaid act are extended to instruments of resignation *ad remanentiam*, and to writs affecting heritable property within royal burghs: And whereas various questions have arisen as to the validity of instruments of sasine and resignation *ad remanentiam*, recorded in such registers, founded on alleged erasures in the said instruments, not patent to the lieges, nor appearing on the record thereof, whereby a want of confidence in the security of the land rights of Scotland has been produced, which ought to be removed:

BE IT THEREFORE ENACTED by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, THAT no challenge of any instrument of sasine, or resignation *ad remanentiam*, shall hereafter receive effect either by reduction or exception, on the ground that any part of the said instrument is written on an erasure, unless it shall be averred and proved that such erasure had been made for the purpose of fraud, or the record thereof is not conformable to the instrument, as presented for registration: PROVIDED always, that nothing herein contained shall affect any judgment pronounced before the 12th day of May in the year 1835, but that all parties who, before the said 12th day of May in the year 1835, shall have objected judicially to the validity of any such instrument or instruments on the ground of erasure, in any suit in which judgment was not pronounced on or before the said 12th day of May 1835, shall be entitled to such costs as the Court of Session, in its discretion, shall think fit to direct: PROVIDED also, that nothing herein contained shall extend, or be construed to extend, to instruments of sasine or resignation and sasine *propriis manibus*; provided also, that where any feudal title of property, or title in security, has been completed in order to remedy or supply defects arising from erasures in instruments of sasine, the validity of the said titles shall not be affected by any thing herein contained.

(c) Lawson, 14th Dec. 1697, M. 11,541.

25. UNSTAMPED DEEDS.—Deeds (under certain inconsiderable exceptions) must, by statute, be engrossed on paper or vellum bearing a stamp, which denotes a particular duty, according to the nature of the transaction. In a work of this description it is sufficient to refer to the statutes, which ought to be strictly obeyed. The want of the proper stamp is not fatal to deeds or instruments relating to heritable title. The rule seems to be, that they are not probative until the stamp is impressed upon them; but that this may be done at whatever time the objection is taken; and a party has been allowed to remedy the defect so as to validate an adjudication that had passed upon an unstamped deed. The penalty which is exigible by Government on the occasion of affixing the stamp to a completed deed, has in practice been effectual to cause a due attention to the statutes.

(a) 44 Geo. III. c. 98; 48 Geo. III. c. 149; 55 Geo. III. c. 184; Bell, Com. i. 319; Pr. 22; Impey and Coventry on Stamp Laws; Lamont, 4th Dec. 1789, M. 16,945. See Denniston, 7th July 1824, S. 3. 218; Munro, 18th Dec. 1830, S. 9. 225.

CHAPTER II.

DEEDS OF CONSTITUTION.

TITLE I. HISTORY OF THE CHARTER.

26. ORIGIN OF THE CHARTER.—The origin of the charter, the leading and principal writ in the constitution of heritable rights, is connected, in a material degree, with that of the feudal law and system, whence most of its essential properties have been derived. The history of that system, great and striking, because extending at one period over the richest portion of Europe, and still influencing, in important respects, the laws and usages of those nations that acknowledged its predominance, has been largely discussed, and elucidated or darkened by a great number of commentators. It would be foreign to the practical purpose of a work of this kind to attempt more than the slightest sketch of the general nature and principles of that remarkable law, which, emanating from the ruins of the Roman Empire in the West, has left some of its most lasting impressions in a country over which that dominion had never extended.

27. FEUDAL SYSTEM. — 1. *Origin of feudal tenures.* — The feudal system, although a striking and remarkable passage in the history of nations, possesses none of those mysterious features for which we are often told that it is distinguished. Nor is its origin to be attributed to the superior skill of the conquerors of the Roman provinces, in devising means for preserving their acquisitions: it was the natural result of the circumstances in which they found themselves placed. Having nothing wherewithal to remunerate their followers but the spoils of the conquered, and those of a destructible nature speedily disappearing before the swarms of the invading hosts, the lands of the natives

who fell in battle—a goodly number—were portioned out to the chiefs, and by them again subdivided among the warriors of inferior rank. These grants were termed *munera*, (the word *feudum* being of more recent origin,) as being wholly gratuitous, the sole obligation required of and undertaken by the *fideles* (or vassals (*a*), as they were afterwards styled,) being of that precise nature which suited the state of constant turbulence that prevailed during a great portion of the middle ages—military fidelity. It is matter for the curious to inquire among what particular division or tribe of the barbarians the feudal law first came into operation; but the foundations of the system, in place of being laid by the Longobards, the Goths, or the Franks, or established in the ancient usages of the Germans and Gauls, are inherent in human nature; and it may be safely affirmed, that similar circumstances would again produce a parallel state of things. Accordingly, the nature and endurance of fees changed with the gradual consolidation of society. The original gifts or *munera* conferred as the rewards of past services, and revocable at pleasure, like the pay of a soldier, to ensure future fidelity, became, in the course of time, grants for life, and acquired the name of *beneficia*. Finally, they received the title of *feuda*, when they attained to what Craig calls their manhood. At this stage, they were descendible to heirs and transmissible to collaterals deriving right from a vassal in the fee. This last character was conferred by the Emperor Conrad, in 1026, on the eve of an important military expedition, which shews that the spirit of conquest retained in fidelity by the original precarious grants, had become so tamed down by the lapse of centuries, as to require a boon which made those grants the absolute property of the vassals, to rouse it to sufficient exertion.

2. *Allodial rights.*—We are informed by historians, and it is consistent with the experience of the world, that the conquerors of the Western Empire mixed with, in place of exterminating the inhabitants, and that, on their conversion to Christianity, many among the invaders learned the language of the conquered, which, as more polished than the languages of the barbarians, continued to be employed on all public

and solemn occasions. The vulgar tongues of the different nations which arose out of the ruins of the colossal fabric, thus shivered into a number of separate pieces, came, however, to combine the characters of the languages both of the conquerors and the conquered, although the Roman, perhaps, entered the more largely into their composition. A similar process was in operation with respect to their laws and customs. The barbarians had no fixed codes of their own. At the period of the dissolution of the Western Empire, the law of Rome was the code published by the Emperor Theodosius the Younger, about the year 438, and by it, and subsequently by the system promulgated by Alaric, the native inhabitants of the new states, and in some degree the barbarians themselves, appear to have been governed, until the appearance of Justinian's celebrated compilation towards the middle of the sixth century. The Roman law continued to be the chief rule of conduct, mixed, of necessity, with the customary laws of the barbarians, and from these combined, arose a variety of imperfect codes, some of which, in particular the *lex Salica*, appear to have in some degree prevailed, even after the twelfth century witnessed the resuscitation of the works of Justinian. The same necessity which imposed, in a great degree, on the conquerors, the language and laws of the conquered, induced the employment by them of the substantial parts of the forms of deeds in use among the latter. These continued for ages to regulate the transmission of the lands which remained in the possession of the native inhabitants, and were borrowed, in so far as adapted to the feudal usages, to record the grants made by the kings and chiefs under that system. These grants, originally revocable at pleasure, were burdened with the obligation of military service, and afterwards with some tangible yearly return by the vassal to his superior. The property of the natives was, on the other hand, unrestricted, and passed freely from seller to purchaser, and from the dead to their surviving relations. But in the earlier of the dark ages, the division of fixed property was not into allodial and feudal, as we now understand these terms (*b*). Lands descending by inheritance were indeed said to be acquired *de alode parentum*, and what are now called feudal, *de munere regio;* but there was a third,

and probably an extensive description of lands, acquired by what we term a singular title, or, as expressed in the old forms, *per venditionis, donationis, cessionis, vel commutationis titulum.* Of these three kinds, allodial lands, and those acquired by purchase, &c. were transmissible at pleasure. But in process of time, all subjects whereof the holders had the absolute power of disposal, appear to have received the distinctive name of allodial, and titles to fixed property came thus to be of only two kinds (*c*), *allodial, and beneficial or feudal;* the former importing a right of absolute property, and the latter a grant to be held of a superior. Forms like the language and laws becoming amalgamated, feudal grants, which became at length descendible to heirs, no longer substantially differed from allodial property; and many owners of this last, in order to acquire a title to the protection of a patron, gradually resigned it into the hands of an overlord, receiving back the lands in the form of a feudal grant. Others were compelled, by the ravages of war or of fire, to apply to the prince for a recognition of their title, to supply that which had been lost or destroyed; and a large extent of land was bestowed on the church and churchmen, who feued it out to vassals for an annual payment or return. By these means the feudal forms came at length to be universally received (*d*).

(*a*) *Valvasores, vassi* and *vassalli* are said to have been different classes of *milites*, who possessed feudal grants. Much speculation has occurred with respect to the meaning of the term *vassal;* (Ersk. 2. 3. 10.) Perhaps a less erudite derivation than some of those ascribed to the word may be hazarded. *Vassi* and *vassalli* appear to be essentially the same term, and to be derived from the Latin, *vadere*, to march. *Valvasor* is probably the same word, with a prefix, derived from *valere*, to be strong. The *valvasores* were called *valvasores regis, vel regni*, and ranked next in dignity to the *comites* or counts; (Const. Feud. l. i. t. 1.)

(*b*) The styles of the middle ages shew in the clearest manner that the term *alode* was employed to designate lands descending by inheritance, in contradistinction to those acquired by purchase or otherwise. Take, for example, the 12th form of Marculfus, (l. i.) which is that of a contract of marriage, by which the husband gives to his wife, "*villas nuncupatas illas sitas in pago illo quas aut "munere regio aut de alode parentum tenere videtur.*" In his 33d form, the heritage of a party is thus described: "*Tam quod per regio munere perceperat quam "et quod per venditionis, donationis, cessionis, commutationis, titulum, vel de alode "parentum.*" Similar expressions are very frequent. Various interpretations have been given of the word *allodial.* Being thus employed to express lands not held of any superior, it may perhaps have been derived from *à*, privative, and

λυω, *solvo*. Allodial property was not solely such as belonged to the native inhabitants. Lands conferred by princes and the *comites*, and other greater vassals, were, in the early ages of fees, frequently granted so as to be descendible to the grantee's heirs, and transmissible at pleasure; (see Marculfus, l. i.) "*Ut* "*ipse et posteritas ejus eam teneant et possideant et cui voluerint ad possidendum* "*relinquant*;" and the right was called *jus proprietarium*.

(*c*) Const. Feud. 2. 26, § 1.

(*d*) Erskine, Ross, Hume's England, Leges Barbarorum, Const. Feud., Dalrymple on Feudal Property.

28. FEUDAL CONVEYANCING.—1. *Origin and progress.*—Mr Ross (*a*) has, with much ingenuity, dissected the forms of ancient Roman conveyances; and it must be admitted, that the styles of deeds employed at the time of the fall of the Empire bear a marked resemblance to those now in use in Scotland, making allowance for the peculiarities of the feudal forms of conveyancing. Examples are given by him, from Mabillon and the Istoria Diplomatica of Maffei, of deeds of donation and sale, the letter or precept of possession, the mode of giving possession, and the form of registration. Many of these styles are in the form of a notarial instrument detailing the *res gestæ*. The will of the disponee is testified by the delivery to the purchaser of a *rod* or *baton* before the witnesses, actual possession having followed in presence of the notary and witnesses. After the dissolution of the Empire, these forms became gradually adapted to the new state of things. In the Styles of Marculfus, a French monk, published about the year 660, is to be found a variety of forms, from which Mr Ross (*b*) traces the origin of the feudal ceremony of resignation, derived from certain usages of the Roman law (*c*). From the notarial certificate of the delivery of possession on the part of the seller to the purchaser, he infers the origin of the *breve testatum*, the written evidence of the feudal transmission or conveyance called the *proper investiture*, which took place in presence of the superior and the *pares curiæ*. In course of time, when transactions became more numerous, and superiors found it inconvenient to attend their courts in person, they appointed a deputy, called a *bailie*, to represent them, to whom were directed their commands or precepts to receive their vassals; and the delivery of sasine to the vassal, in virtue of these precepts, was thus called the *improper investiture*.

The precept, and the certificate by the bailie following upon it, bear a marked resemblance to the epistolary grant or charter common in the middle ages, derived from the Roman conveyance, and the *notitia* (*d*), or subsequent written declaration, made by a notary upon the fact of possession being given to the purchaser or disponee. In the improper investiture in use in Scotland, the precept of sasine or possession was sometimes granted with reference to a prior charter of the lands, *secundum tenorem chartæ confectæ;* but, most generally, the precept was first in date, and bore to be *secundum tenorem chartæ conficiendæ.* It would appear, that although the charter was usually made out, the precept in this latter case was of itself a valid title when followed by possession (*e*).

2. *In Scotland.*—The period of the introduction of the feudal law, and its system of conveyancing, into Scotland, has been the subject of much speculation. Whether we agree with Sir Thomas Craig, that we received them during our early friendship with France, or with Lord Kames, who is followed by Dalrymple, that they were the result of one bold political stroke of Malcolm III., or that they gradually took root, as supposed by Lord Hailes (*f*), during a period subsequent to that King's reign, no doubt can exist that the feudal usages influenced the state of land property in this kingdom long prior to the compilation of the *Constitutiones Feudorum*, which dates from the middle of the twelfth century. For, without founding on the deliberate recognition of the *Regiam Majestatem* as a Scottish composition in several acts of our Legislature (*g*), it is enough to refer to the reasoning of Mr Erskine (*h*) in support of the authenticity of that ancient compilation, and to that of Mr Ross (*i*) in favour, if not of its originality, at least of its adaptation from the English treatise by Glanville to the existing circumstances of Scotland. Even Craig, although he denies the authority of the Books of the Majesty, expresses an opinion that the feudal forms prevailed long prior to the Norman conquest of England, and before their introduction into that kingdom (*k*). The opinion of Mr Ross (*l*) coincides with that of Lord Hailes, that the feudal usages found their way into Scotland soon after the period of the Conquest, and subsequent to the reign

of Malcolm Canmore; but whatever may have been the true period of their introduction, it is beyond a doubt, that for centuries before Craig composed his work, there existed, if not a written, at least a customary system, founded on the leading principles of the feudal law. It is therefore with some shew of reason that Ross (*m*) observes of Craig, that rejecting the sources of Scottish law and forms which existed in the styles of writs, he founds his treatise, in a great measure, on the written feudal constitutions, in which he is followed by Lord Stair. To what extent his strictures are justified with reference to the effect which Craig's work has produced on our system of feudal conveyancing, it is unnecessary to inquire. Enough, that our peculiar forms are now so matured, and the principles on which they are founded so completely naturalised, that the ingenious disquisitions of Mr Ross are matter more for curious investigation and antiquarian research, than the grave consideration of the practical conveyancer.

(*a*) Ross, 2. 65, *et seq.*

(*b*) Ross, 2. 72. *et seq.*

(*c*) In the *Leges Barbarorum*, compiled by F. Paulus Canciani, and published at Venice in 1785, are to be found a variety of ancient forms besides those of Marculfus, which are ascribed to Jacobus Sirmondus, Stephanus Baluzius, Bignonius, &c. relating to districts possessed by the Franks. Their dates are various, but they bear a close resemblance to the forms of Marculfus. In the same collection there is a series of forms, one hundred in number, arranged under different heads by Goldastus, which he calls, "*Centuria Chartarum Alamannicarum.*" They extend over a period of several centuries. To these forms reference will be occasionally made.

(*d*) The *Notitia* was the certificate, or instrument of a notary, or the officer of the court of a prince or great vassal, of the investiture of a sub-vassal. Mr Ross, (ii. 122-3.) in comparing the *breve testatum* with the *notitia*, states, that the Norman lords, at and after the time of the Conquest, were in use to grant these certificates in their courts. It is remarkable, that the same form prevailed in the courts of the lords of what had been the ancient kingdom of the Lombards, so late as the 13th and 14th centuries, as appears from styles in the Leges Barbarorum, (2. 465. and foll.) called *formulæ antiquæ judiciales in usum regni Italici.*

(*e*) Stair, 2. 3. 14.

(*f*) Kames' Essay on British Antiq.; Dalrymple's Feudal Property, 23-4; Hailes' Annals, 1. 30.

(*g*) 1425, c. 54; 1471, c. 47; 1487, c. 115.

(*h*) Ersk. 1. 1. 32. 36.

(*i*) Ross, 2. 60-64.

(*k*) Craig, 1. 8. 1. and 4.

(*l*) Ross, 2. 16. 17.

(*m*) Ross, 2. 61-2. Mr Ross accuses Craig of condemning the Books of the Majesty upon his own authority. But he cannot justly be charged with this; for although the weight of authority may be in favour of their authenticity, Craig adduces a variety of cogent reasons for the doubts which he expresses of their Scottish origin; (2. 6. 25; 2. 13. 39).

29. MEANING OF A FEE.—Craig (*a*) (after Zasius) thus defines a fee: "*Beneficium, seu benevola et libera rei immobilis* "*aut æquipollentis concessio, cum utilis dominii translatione, re-* "*tenta proprietate seu dominio directo, sub fidelitate et exhibi-* "*tione servitiorum honestorum.*" This definition is not in all respects applicable to a modern feudal grant; but the essential character of a fee may hence be described as, 1*st*, A grant of lands or of some right connected with the soil, under the condition of the vassal rendering a return of some description to the granter; and, 2*d*, The reservation by the granter of the radical right in the lands. Writing, which is an essential character with us (*b*), was not so by the feudal constitutions (*c*). The terms *dominus*, and *fidelis* or *vassus* or *vassallus*, are as old at least as these Books of the Feus; but those of *dominium directum*, and *dominium utile*, employed by Craig in his definition, and incorporated into our law language, are of more modern origin. It has been the subject of much discussion, if the fee or right in the vassal, which is a right compounded of a written grant, and of actual possession, should be defined by *dominium utile*, by *ususfructus*, or by *beneficium*; "Nor (as "Craig expresses it), did the Trojans combat more hotly "with the Greeks for the body of Achilles, slain by Paris, "than do the more recent commentators dispute with the more "ancient, respecting the proper definition." The term *dominium utile* is considered by that elegant writer to be the most expressive of the nature of the right as established in Scotland; and in this view he is followed by Stair (*d*). The terms *dominium directum* and *utile* are convenient phrases; but it may be doubted if, in the nature of a fee, there is any right that can properly be defined by the word *dominium*, which, it is thought, is solely applicable to allodial property. The absence of a title to enforce a renewal of the investiture, on the death of a vassal, or a sale of the lands, without the aid of statute, seems to indicate that a fee is a mere usufruct.

(*a*) Craig, 1. 9. 5.
(*b*) Erskine, 2. 3. 11.
(*c*) Const. Feud. 1. *passim.*
(*d*) Craig, 1. 9. 4; Stair, 2. 3. 7.

30. DIVISION OF FEES.—Fees or feus are divided and subdivided by Craig (*a*) with much minuteness. In the present practice of Scotland they consist of *ligia* and *non-ligia*, or grants from the Crown and from subject-superiors; and *antiqua et nova*, or heritage and conquest, the former derived from an ancestor, and the latter acquired by purchase, gift or other singular title. Fees are likewise divisible or indivisible. Of their own nature they are divisible, but by our law, a superior cannot divide the *dominium directum*, so as to increase the number of superiors, without the vassal's consent. Finally, they are redeemable or irredeemable, the former consisting of those granted in security of debts, either voluntarily by the proprietor, or judicially in a process of adjudication, and which are extinguished upon payment; the latter, of such as are granted absolutely for a price or other consideration, and can be extinguished only by resignation (*b*).

(*a*) Craig, 1. 10.
(*b*) Ersk. 1. 2. 12.

31. RESTRICTIONS UPON ALIENATION.—(1.) All heritable subjects which belong absolutely, or, as it is expressed, in fee-simple, to the vassal, may be granted in fee to another or sub-vassal, and so on by one vassal to another without limitation, each vassal, except the last, being thus both a superior and a vassal, and holding a right of *dominium directum* in his person. But the last only can possess the *dominium utile*. A vassal who grants a sub-fee, is called the sub-vassal's *immediate* superior, and the person of whom the granter holds, the sub-vassal's *mediate* superior,—terms which need no explanation. This unrestricted power to multiply fees was not always enjoyed by landholders; but as the subject of subinfeudation is intimately connected with the history of the disposition of sale, it will be more fully explained below. (2.) The power to grant sub-fees does not include a right in the superior, whether the Crown or a subject, to make a second

grant so as to interpose another between himself and his vassal; but when the Crown acquires a right of superiority by forfeiture, the donator of the Sovereign may take the place of the rebel, as there is here no multiplication of fees (*a*). When again the church was superior, the act of annexation (*b*) makes the vassals Crown vassals, and thus the ordinary rule comes into operation (*c*). (3.) Certain persons, such as married women and minors, by law incapable or denied the power of consent, cannot by their own deed alienate their heritage. (4.) From the general rule of law that land rights are alienable, is excepted the annexed property of the Crown, which cannot be granted to a subject without the sanction of Parliament. The same rule applies to heritage possessed under strict entail. (5.) All persons are capable of receiving and holding heritable property, under certain inconsiderable exceptions (*c*).

(*a*) F. 2. 55. 1; Rob. III. c. 4; Craig, 2. 11. 35; Stair, 2. 4. 5; Ersk. 2. 5. 4.; D. of Gordon, 8th July 1714, M. 10,975.

(*b*) Ersk. 2. 3. 14; Stewart, 6th Nov. 1820, M. 15,012.

(*c*) Ersk. 2. 3. 13-16.

32. DIFFERENT KINDS OF HOLDING.—The original feudal tenure, as before stated, was by military service; and the forfeitures, or as we style them, casualties, incident to the holding, were incurred chiefly by the neglect of military duties and discipline, and personal or family affronts shewn to the superior. In the Books of the Feus, we accordingly look in vain for the several kinds of holding which have prevailed in Scotland, or indeed for any species of tenure, except by some sort of military service; whence we may infer that the numerous and extensive grants acquired by the Church *in puram elymosynam*, and by private persons *in feudum francum* which implied what is now expressed by blench or *blancum*, were of a later date. The right expressed in the Const. Feud. by the terms *per libellum*, or *libellario nomine*, was not a feudal tenure, but a sale under the colour of a location, for the purpose of evading the feudal privileges of the superior (*a*); and judging from the forfeiture applicable to this species of alienation, which did not attach to a mere trans-

mission of the fee to another vassal (*b*), it was probably an attempt to render the subject allodial. The natural progression of society, and the desire of superiors to derive something better than mere barren services from their extensive possessions, caused the division of fees into the different kinds of modern holdings. Craig (*c*) divides them into *military*, *blench*, *burgage*, *ecclesiastical* (including *Emphyteusis* or *feu*,) and *mortmain*. Since his times, the number has, from the operation of the same causes, become more limited.

(*a*) F. 2. 9. § 1.
(*b*) F. 2. 9. Pr. 2.
(*c*) Craig, 1. 10. 27. and foll.

33. WARD-HOLDING.—The holding of ward, (a translation of the term *guardia*, used in the Books of the Feus to express a particular branch of military tenure,) which, at a period now happily past, entered deeply, and with a blighting effect, into our system of land-rights, was, with its casualties, abolished by statute (*a*). For a full account of the nature of this holding, which was a modified kind of military tenure, gradually relaxing in rigour as the country acquired repose and civilisation, reference is made to our institutional writers. The tenure of ward was presumed, unless some other was expressed, and the return consisted of *servitia debita et consueta*, services used and wont; or sometimes a particular service, such as furnishing an armour-bearer, a bowman or a foot-soldier, was specified (*b*). All lands formerly held ward of the Crown now hold blench, for payment of a penny Scots, if asked only; and of those which held of subject-superiors, the tenure is now *feu*, for payment of feu-duty at a rate fixed by an Act of Sederunt, passed under the authority of the statute (*c*). The vassals of the principality lands were placed in the same situation with those of the Crown by another statute (*d*), and a royal warrant following upon it, dated in January 1753.

(*a*) 20 Geo. II. c. 50.
(*b*) Craig, 2. 3. 33; Ersk, 2. 4. 2.
(*c*) 20 Geo. II. c. 50; A. of S. 8th Feb. 1749; Ersk. 2. 5. 24.
(*d*) 25 Geo. II. c. 20.

34. BLENCH-HOLDING.—Craig informs us, that the holding now known by the name of blench, was originally called *feudum francum*, because the vassal was free of all feudal services, being bound only by an oath of fealty. It arose when the feudal manners began to give place to a certain degree of industry and civilisation, and superiors who were in want of money were willing to give lands to their vassals at nominal or quit rents, in consideration of a large sum advanced in a single payment. The *tenendas* bears to be *in libera alba firma feudo et hæreditate pro perpetuo*. This kind was not presumed, and one of two conditions was essential to a blench-holding; either that the annual payment or prestation, as being elusory, and in acknowledgment merely of the superiority, bore to be *for all other service*, or that the grant had been made *in free blench farm* (*a*). This tenure will now *in dubio* be presumed, at least in lands held of the Crown (*b*).

(*a*) Craig, 1. 10. 5.
(*b*) 20 Geo. II. c. 50.

35. BURGAGE-HOLDING.—1. *Definition.*—The tenure of burgage *(feudum burgale vel plebeium)* (*a*), is defined by Mr Erskine to be that by which "royal burghs hold of the Sove-"reign the houses and lands that lie within the limits de-"scribed in their several charters of erection." When it happened that a royal burgh was erected within a territory held in whole or in part of a subject-superior, the rights of such superior were reserved entire (*b*). Burgage-holding was introduced for the benefit and protection of the trading and mechanical portion of the community, who were driven to take refuge in towns from the dangers of the open country, during the barbarous period of feudal warfare. Craig describes it as compounded of military or ward-holding, and some other which he does not designate, but of which he specifies the services to be, "*vigiliæ, custodiæ intra burgum* "*et ejus territorium, collationes, indictæ, tributa.*" The service of watching and warding is incident to this tenure, and is due within the liberty of the burgh, although not expressed in the charter of erection (*c*). In some cases there is a pay-

ment to the Crown, *nomine census burgalis*, called *burgh maill*, which is generally of no considerable amount.

2. *The corporation the vassal.*—It is stated by Sir Thomas Hope (*d*), that the common lands which belong to the burgh are holden of the Sovereign "in free burgage *quoad* "the whole body of the town," and thus each proprietor within the territory is properly a burgess, as possessing a part of the common property. It seems, however, to be inaccurate to say (*e*) that the burgesses are individually Crown vassals. Mackenzie (*f*), perhaps with more propriety, observes, that the "burgh is the vassal and not the particular burgesses." An attention to this distinction is necessary to reconcile the different notions which have been entertained with respect to burgage titles. The corporation or whole body of the town being the vassal, the individual burgesses hold of the Crown only as members of the corporation; and the particular titles which each has to his share of the common subject, may be regarded as merely evidencing his right in questions with the corporation or its other members. When the right of a burgess becomes extinct by the failure of heirs, his subject, therefore, does not fall to the Crown, but to the corporation; and, for a like reason, the corporation has a right to all burgage property which individuals cannot claim.

3. *Town-council the administrators.*—The town being the corporation, the council, as representing the community, are the administrators of those parts of the burgage property which remain with the corporation as such. Although, therefore, the practice of centuries has sanctioned a mode of granting such property in vassalage to be held feu of the corporation, there seems to be nothing in principle to prevent the council from conveying it in the form proper to burgage property, viz. by resignation; but it would appear that a charter is not a competent mode of conveyance (*g*).

4. *Bailies represent the Sovereign.*—It is to be kept in view that the bailies or magistrates of the burgh have powers distinct from those possessed by the town-council as a body. They are not proprietors of the burgage property, but the representatives of the Sovereign in receiving resignations and granting new infeftments to the individual burgesses (*h*).

5. *May burgage property be feued?*—The question has been much agitated, if the particular portions of the burgal territory belonging to individuals may competently be conveyed, to be held of themselves, by any of the ordinary tenures. Their powers so to change the system of burgage conveyancing, for such would be the practical result of subinfeudation in burgage-holding, is generally doubted. The corporation, or Crown vassal, as sole proprietor of such portion of the territory as remains in the hands of the council, has an undoubted title to grant it in feu-farm; but the individual burgesses possess their property as portions merely of a common subject, and as co-proprietors, so to express it, along with the corporation. It is only by the suppression of a burgh that this conjunct right can be dissolved: the corporation being then at an end, the burgesses remain the sole and absolute proprietors of their respective portions of the territory; and as the whole territory formerly held of the Crown, they become Crown vassals in the proper sense of the term (*i*).

6. *Corporate property not burgage.*—Royal burghs may, as corporations, hold property by the ordinary tenures. Of such they are the proper superiors, and they receive the usual casualties of superiority (*k*).

(*a*) Craig, 1. 10. 31.
(*b*) Ersk. 2. 4. 8.
(*c*) Craig, Ersk., as above.
(*d*) Minor Pract., t. 9, § 16.
(*e*) Ersk. 2. 4. 9.
(*f*) Mack. 2. 4. 9.
(*g*) See Dawson, 14th Nov. 1827, F. C., S. 6. 19; affirmed, 31st March 1830, 4 W. S. 81. See Hope's Min. Pr. as above; Stair, 2. 2. 58; Ersk., as above. See 3 Geo. IV. c. 91, § 5-8.
(*h*) 1567, c. 27.
(*i*) Urquhart, 17th Jan. 1758, M. 15,079.
(*k*) Ersk. 2. 4. 9.

36. MORTMAIN.—Lands granted to the church or to corporations for religious, pious or public purposes, are said to be given in mortmain, *(ad manum mortuam,)* or to be mortified. Craig (*a*) classes mortmain among the ecclesiastical fees, and derives the name from the perpetual existence of the vassal, the word *mortua* being taken for *immortalis*, as the

possession of what is given to the church or to hospitals is extinct as to the world, and as regards the vassal everlasting. Grants to the Church of Rome in mortmain were likewise said to be *in puram elymosynam*, the only services being prayers and supplications, or masses to be performed for the souls of the granter or his friends after death. Ecclesiastical fees in mortmain differed from other grants to the church, which were held by the tenure of ward for the performance of military services by substitutes (*b*). It is, however, unquestionable, that for centuries prior to the Reformation, the only services prestable by the vassals in ecclesiastical fees were of a spiritual kind, and thus they more nearly resembled blench than ward fees. The only subjects now possessed by the church, in Scotland, are manses and glebes, property which is not held by any of the feudal tenures, and is generally styled allodial. Lands may, however, still be granted in mortmain to hospitals, universities, or other corporations, although the granter's superior, who, by acknowledging the corporation as his immediate vassal, would lose his casualties for ever, may, by withholding his consent, render the grant abortive, except as a base-holding, unless a sufficient equivalent be offered for these casualties (*c*). Such property is therefore usually held in the names of trustees, on whose decease the ordinary casualties are due. The Crown in Exchequer accordingly refuses to pass signatures of lands conveyed to corporations (*d*).

(*a*) Craig, 1. 10. 35.
(*b*) Craig, 1. 10. 32.
(*c*) Hill, 17th Jan. 1815, F. C.
(*d*) Ersk. 2. 4. 11.

37. FEU-HOLDING.—The tenure now chiefly in use in Scotland, and thus the most important, is that of *feu-farm*, *(in feu-difirma feodo et hæreditate pro perpetuo,)* and it differs in the greatest degree from the original military holding expressed by the term *feudum*. The origin of the word *feu*, as the name of a distinct species of holding, is not clear. It scarcely occurs in Craig, who describes this particular tenure under that division of ecclesiastical fees which were granted *in emphyteosin aut ad libellum;* and he states, that *feudum ad libellum dare*

was nothing else than *in perpetuam emphyteusin locare* (*a*). *Emphyteusis* was unquestionably the term originally employed in charters written in Latin, to denote a holding in feu-farm, (now expressed by *feudifirma*); and our institutional writers (*b*) notice, more or less fully, the close resemblance of feu-holding to the *emphyteosis* or perpetual location of the Romans, from which it has apparently been derived. But it is not easy to perceive any resemblance between *emphyteosis* and the grant *ad libellum*. The terms, *ad libellum dare*, in the *Const. Feud.*, were employed to designate a perpetual alienation to a purchaser, under the colour of a location, for an elusory annual return or *pensio*, to the exclusion of the rights of the superior (*c*). But, in tracing the origin of this holding in the Styles of the middle ages, it will be found that a grant in feu-farm has no resemblance to a conveyance for an adequate price, and a merely elusory annual payment. The grant to which it bears the strongest likeness was made for a valuable yearly return or *census* in money or victual, and was probably framed by the churchmen solely upon the model of the Roman emphyteosis, who thus put to profit their extensive possessions. This holding is therefore properly classed by Craig (*d*) under the head of ecclesiastical tenures. It came in all probability to be distinguished by the term *feu*, as being the most common of the feudal tenures, and yielding the only constant valuable return to the superior. Feu-holding was the next step in the improvement of land rights, after the tenure of *soccage*, (from *sok*, a plough,) which at an early period prevailed in Scotland (*e*) as well as in England, and was a grant of a small piece of land, for the service of cultivating other lands belonging to the granter. This holding is as old at least as the *Leges Burgorum*, and it is recognised in several ancient statutes. It was at an early period (*f*) made lawful for the prelates, barons and freeholders to grant subaltern rights in feu-farm, which were protected against the casualties of ward-holding falling to the Crown, and this permission was renewed by subsequent statutes. Feu-holding has sometimes, but incorrectly, been termed a location. Although probably derived from the Roman *emphyteosis*, it differs from the *locatio* in being perpetual. *Em-*

phyteosis implied a perpetual grant of barren lands, in order to their improvement.

(*a*) Craig, 1. 10. 33.
(*b*) Stair, 2. 3. 34; Mack. 2. 4. 6; Craig, as above.
(*c*) F. 2. tit. 9. § 1. and t. 55.
(*d*) Craig, as above.
(*e*) See Charter in Appendix to Erskine's Instit.; Dalrymple on Feudal Property.
(*f*) 1457, c. 71.

38. CASUALTIES OF SUPERIORITY.—(1.) The fixed rights of the superior will be more fully noticed under the *Reddendo* clause of the charter, and the entry of heirs. They are, 1*st*, A title to exact the duties and services specified in the charter; and, 2*d*, To require production and exhibition of all deeds relating to the fee, which the superior may not have in his possession, or within his power, in order to his learning their true nature (*a*). For this it is sufficient that he be duly infeft in the lands. (2.) Besides those rights which are inherent in the superiority, there are others denominated casualties, as occurring at uncertain intervals, founded partly in the feudal constitutions, but chiefly in custom, or express stipulations in the charter or contract by which the fee is constituted. The only casualties which now exist, as affecting the feudal relation, are *non-entry* and *relief*. The former consists in certain privileges, which are forfeited to the superior by the delay of the heir to apply for a renewal of the investiture after the ancestor's death, and is common both to feu and blench holdings: the latter is a fine or payment due by the heir on obtaining such renewal, and applicable to feu-farm only. These are explained under another head. See *Entry of Heirs*. (3.) Burgage-holding and mortmain, in which the vassal never dies, have no casualties. (4.) The casualties of ward-holding, now abolished, were *ward*, *marriage* and *recognition*. The first, where not taxed or restricted, entitled the superior to the whole profits of the ward-fee during the minority of the heir; by the second, he had a right to a sum from the heir who had not been married before his ancestor's death, at the age of puberty, as the value of his tocher; and the third implied a forfeiture of the fee, on the alienation of

more than the one-half without the superior's consent. (5.) The casualties of *single and liferent escheat* fall to the Crown on account of crimes, and do not affect the constitution or transmission of feudal rights. (6.) Those of *disclamation*, which meant the judicial disclaiming of the superior as such, and of *purpresture*, incurred by the vassal's encroaching on the streets, highways, or commonties of the King or other superior, although not expressly abolished, have, in the progress of society, become obsolete. (7.) The irritancy *ob non solutum canonem*, in feu-holding, which founds an action for having the right declared at an end, on account of the vassal failing to pay the duties for two full years, is not a casualty of superiority, but a ground for the direct forfeiture of the fee; (below, § 52.) (8.) The *composition of a year's rent*, payable by adjudgers and disponees, is a claim competent to the superior by statute (*b*). See *Charter of Confirmation.*

(*a*) Ersk. 2. 5. 2-3.
(*b*) Ersk. 2. 5. 5, and foll.

39. NATURE OF THE RIGHTS OF SUPERIORITY AND PROPERTY.—The right of the vassal in the *dominium utile* or *property* has long been considered absolute, being fortified by means extraneous to the original nature of the feudal grant, whereby heirs and disponees are enabled to enforce a renewal of the investiture. The *dominium directum* or *superiority*, which, in the ages of personal military service, was the more eminent right, is now in substance reduced to a mere security over the lands for a yearly payment by the vassal, and a fine or grassum on the renewal of the investiture, fortified by an express or implied irritancy. Still, from the peculiar technical structure of the feudal title, this lesser right continues to be in form a right of superiority, and cannot in a legal sense be regarded as a mere burden on that of property, the vassal being denied the power of extinguishing it by purchase or payment. For although intermediate rights of superiority may, with consent of the owners, and by means of peculiar forms, be removed from the series, the actual possessor thus only approaches more nearly to the Crown, which is the feudal head and paramount superior. The system of connected fees has

now become so thoroughly engrafted on our law and customs, that the question of a change from feudal to allodial rights is beset with many difficulties. It must be confessed, however, that the forms of our conveyances might, with considerable advantage, be shortened; and it is believed that the great majority of the profession would cordially approve of a remedy to the redundancy which exists in our styles. At the same time, it will be generally acknowledged, that any extensive alteration on a system which ages have consolidated ought to receive much and deliberate consideration.

40. GENERAL VIEW OF THE FEUDAL RELATION.—(1.) The feudal system, originally introduced for rewarding, or retaining in subjection the soldiers and dependents of a rude age, has in Scotland given place to an artificial system of land-rights, based upon the principles, but differing widely from the forms, that of old regulated the interests and obligations of the superior and vassal. The feudal grant is by *charter*, which describes the lands, and contains certain clauses called feudal or executive, that have originated in the altered usages of society, serving as authority to another, as the representative or *bailie* of the superior, to give sasine to the vassal. The charter, although absolutely binding on the granter and grantee *ex contractu*, is, in a feudal sense, a mere warrant (the *titulus*) for completing the investiture of the vassal. This is done by means of the ceremony of infeftment, (the *modus transferendi dominii*,) and the due authentication and registration of a certificate of the fact, called an *instrument of sasine*. (2.) The vassal may, by disposition, or other sufficient deed of conveyance, transfer his right to another at pleasure; or he may make it a source of credit, by impledging the lands in security of the loan of money, by forms strictly framed upon the feudal rules; and the system of feudal conveyancing is so expansive, that these forms are adapted to the creation of burdens or securities, either by constitution,—by means of deeds and instruments relating to the loan as a separate transaction, or by reservation,—the declaration of the burden in the deeds of transmission of the fee. (3.) The right of the vassal, if not alienated by him, passes to the heir duly declared by his own

written provision or destination, or pointed out by law. (4.) All these transmissions and transactions, proceeding thus according to the strictest feudal rules, are completed either upon the principle of sub-infeudation, or by means of the sanction or *confirmation* of the original superior, who cannot withhold, whilst he has in general an interest to adhibit his consent. (5.) It is an inflexible rule, that no feudal or real right can be completed unless by means of a registered instrument of sasine, or of resignation *ad remanentiam*. A title thus perfected, if flowing from the true proprietor, is preferable, therefore, to an inchoate or merely personal right, such as a warrant for infeftment, although prior in date, and contained in the most onerous conveyance; and, what gives stability to the system, a feudal title, followed by uninterrupted possession for forty years, becomes a legal right, to the exclusion of all other rights, whether prior or posterior in date; and no inquiry is permitted into the origin of the title on which the property has been so enjoyed, unless on the plea of falsehood or fraud. (6.) The meaning of the word *infeftment*, so frequently used in relation to feudal conveyancing, differs considerably from that of *sasine*. Infeftment was originally employed to denote those deeds, whether charter and sasine, disposition sasine and confirmation, or other titles of investiture, whereby a feudal right is completed. It still occasionally bears the same meaning, but more generally denotes the ceremony of infeftment. The word sasine often occurs in the latter sense,—to give sasine, meaning the same as to give infeftment; but it usually means the instrument of sasine, and never the whole title or investiture.

41. DEFINITION OF A CHARTER.—The relation of superior and vassal, constituted by charter and sasine, forms what Craig and the old feudists style the *improper investiture*. The obvious derivation of the word *charter* from the Latin *charta* gives it a wide meaning; and we find in the forms of ancient writings that the term *charta* was used indifferently to denote any document by which a right was conferred, and was nearly synonymous with *epistola*, a term in general use from the epistolary form which writings then assumed. The word charter

has now received a distinctive meaning, and applies to the writ, whether original or by progress, which a superior grants to a vassal or his disponee. The definition of a charter given by Mr Erskine, is perhaps too broad according to modern notions. He states, that "it imports not whether "it be executed in the style of a disposition or of a charter, "which differs from the other only in form, or barely of "a precept of sasine, or procuratory of resignation." But there seems to be a clear distinction, not merely in language but in substance, between a disposition or procuratory of resignation, which is a mere warrant to the superior to infeft a disponee, and the writ whereby he receives the superior's confirmation of, or consent to, the transference. In a single instance, the terms disposition and charter are undoubtedly synonymous; but a feu-disposition is very distinct from the ordinary disposition of sale; it is a feu-charter in every thing but the substance on which it is written. In practice, the distinction between the terms charter and disposition receives the support of conveyancers. The modern disposition of sale, is a deed of a highly complex nature, combining the properties of the original charter, the old deed of transmission or charter *a me de superiore meo*, and the conveyance by resignation.

TITLE II. CLAUSES OF THE ORIGINAL CHARTER.

42. ARRANGEMENT OF THE CLAUSES.—By the original charter *de me et successoribus meis*, the lands are to be held of the granter as superior, by the grantee as vassal, the holding being feu or blench according to the agreement of parties. Of old, the conveyances in use amongst the inhabitants of feudal countries were expressed in the Latin tongue, from a cause already noticed. The introduction of the Roman and feudal laws into Scotland brought with it the language in which they were written, and all principal deeds, such as charters and sasines, were expressed in Latin, until that language was excluded from our forms by the Supreme Judges appointed during the Usurpation in 1652. After the Restoration the former practice was restored by Act of Sederunt (*a*); but by force of custom the

Latin has ceased to be employed in ordinary business, and it is now only used in deeds issuing from Chancery, and sasines and retours following upon them. The charter consists of the following clauses: The *narrative*, *dispositive*, *tenendas*, *redendo*, clause of *warrandice*, *assignation to the title-deeds and rents*, clause of *warrandice of that assignation*, *obligation to free the subjects of public burdens*, clause of *registration*, *precept of sasine*, clause of *subscription or testing clause*.

(*a*) A. S. 6th June 1661.

43. NARRATIVE CLAUSE (*a*).—The introductory clause of the charter is styled the narrative. It contains,

1. *Name and designation of the granter.*—The superior or granter of the charter is here described by name, surname, and occupation or residence, and as heritable proprietor of the subjects. The term heritable proprietor implies his being infeft in the lands conveyed, and, in practice, the granter's title is uniformly completed before executing an original charter; but a charter granted by a party, holding under a personal right only, will be validated by his subsequent infeftment. See *Disposition of Sale*. When another besides the granter has an interest in the lands, he ought to join in the deed. With regard to the effect of a bare consent by one having such interest, Mr Erskine (disregarding the opinion of Craig) conceives that a party who has truly the right to the subject validates, by his simple consent, the conveyance to the vassal; at least founds an action of adjudication in implement against himself (*b*). The question ought to be avoided by the use of the terms *joint consent and assent*, with reference to all the parties introduced, whether as proprietors or consenters. Variations arising from the status of the granter are more frequent in the disposition of sale, to which reference is made.

2. *Cause of granting or consideration.*—It is proper and customary to state on the face of the clause whether the consideration be onerous or gratuitous, although this is not essential to the validity of the grant, but of importance only in a question of warrandice (*c*). But if a price has been paid, it must be specified (*d*). Where the consideration is not stated, it is the opinion of Craig that the words "*dedisse*"

and "*concessisse*," import a gift, and "*vendidisse*" and "*alie-*" "*nasse*" a purchase. And Lord Stair conceives, that where no cause is expressed, the grant must be considered gratuitous. It is manifest, however, that questions of this nature ought never to occur. If the consideration be in money, it is imperative on the practitioner to insert the amount; and where the grant is for some other onerous cause, such as the conveyance of other subjects to the granter, it is his duty to narrate the true cause of granting.

(*a*) Know all men by these presents, that I A., heritable proprietor of the lands and others after disponed, in consideration of the sum of £. instantly paid to me by B., and of which I hereby acknowledge the receipt, renouncing all exceptions to the contrary; and of the feu (or blench) duty herein after stipulated to be paid to me, and for other causes me moving.

(*b*) Ersk. 2. 3. 21.

(*c*) Stair, 2. 3. 14.

(*d*) 48 Geo. III. c. 149, § 22.

(*e*) Craig, 2. 3. 18.

(*f*) Stair, 2. 3. 14. (1.)

44. DISPOSITIVE CLAUSE (*a*).—The dispositive is the ruling clause of the charter, and cannot be contradicted or even limited by the terms of any other clause (*b*). This clause, with the *tenendas*, *reddendo*, precept of sasine, and testing clause, form the essential parts of the charter as a feudal grant and probative writing. It is observed by Mr Bell (*c*) that the dispositive clause contains in itself the essence of the charter, and that if the deed were to stop there, sasine might be obtained by means of a separate precept, or by means of adjudication in implement. This would hold true of a mere conveyance of property (*d*); but to constitute a *feudal* grant, not only are *verba de presenti* necessary, but the holding and annual payment or prestation must, from the nature of the right, be expressed. Where the writing is even sufficient to warrant adjudication in implement, the proper feudal clauses must still be inserted in the charter following upon that proceeding (*e*). The particulars which fall to be noticed under this head are numerous.

(*a*) Have sold, alienated, and in feu (or blench) farm disponed, as I, by these presents, SELL, ALIENATE, and in feu (or blench) farm DISPONE from me, my heirs and successors, to and in favour of the said B., his heirs and assignees

whomsoever, heritably and irredeemably, ALL and WHOLE the lands of lying within the parish of and shire of together with the teinds, both parsonage and vicarage, thereof, and parts, pendicles and pertinents of the same.

(*b*) Ross, 2. 157-8; Bell's Pr. § 760.

(*c*) Bell's Pr. § 760.

(*d*) Stair, 2. 3. 14.

(*e*) See Craig, 1. 9. 20-1-2; Erak. 2. 3. 11; F. 2. 23, *in fine*.

45. DISPOSITIVE WORDS.—The terms of conveyance or alienation vary according as the grant is onerous or gratuitous; *give*, *grant* and *dispone*, being the proper words to express a gratuitous conveyance, and *sell*, *alienate* and *dispone*, a conveyance for an onerous consideration (*a*). But of these, *dispone* is the only term which appears to be essential. It may, indeed, be considered a *verbum solenne* in all conveyances, unless by resignation (*b*). Although the word *alienate*, or, as formerly written, *annailzie*, is not indispensable in a technical sense, it has, in common acceptation, a wider signification than *dispone*, as including every mode of transmitting heritage; and in interpreting clauses in deeds of entail, it was held by the Court to embrace tacks or leases of more than the ordinary endurance. But, in the House of Lords, the word dispone has been considered to have a legal meaning at least as broad as alienate. This latter term has probably been introduced, in its comprehensive sense, by reason of the frequent use by Craig of the Latin word *alienare*, which he appears to have chosen as more classical than *disponere*, although both have substantially the same meaning as the Scotch term, *away put*. See *Entail*.

(*a*) See Stair, 2. 3. 14.

(*b*) See Hamilton, 3d March 1815, F. C.

46. HEIRS AND ASSIGNEES.—The conveyance is made to the vassal, and his heirs and assignees whomsoever, words which are not now essential to transmit to his heirs, or empower him to convey to a stranger. At one period, however, their use was of much importance; for, after fees had in general become hereditary, they were not so in Scotland, but personal only, unless heirs were expressed (*a*), or the conveyance made to the vassal *heritably and irredeemably;* the

point at least cannot be considered to have been settled until after Craig wrote (*b*). With respect to assignees, the employment of the term was essential to enable a vassal to convey his fee to a stranger, even before infeftment. In the opinion of Craig (*c*), a grant which bore to assignees, empowered the vassal to convey without the renewed consent of the superior, even after he had taken sasine; but this notion was not sanctioned by the Court (*d*). Fees were deemed *stricti juris*, so that after infeftment on a conveyance *hæredibus et assignatis quibuscunque*, the obligation of the superior was held to be fulfilled, except as regarded the proper heirs of the vassal. These terms had thus a meaning very different from the words *vassallo et quibus dederit*, which imported a consent to alienation; but since the date of the statute which introduced a mode of enforcing an entry from the superior, whether by an heir or a disponee (*e*), no doubt could exist of the transmissibility of fees without express mention of heirs and assignees.

(*a*) Craig, 1. 10. 7; 2. 3. 28.
(*b*) Stair, 3. 5. 5-6.
(*c*) Craig, 3. 3. 31.
(*d*) See Ross, 2. 305, and fol.; Carnegy, 5th Feb. 1663, M. 10,375; Lockhart, 14th Jan. 1696, M. 6411.
(*e*) 20 Geo. II. c. 50.

47. DESCRIPTION OF THE LANDS.—1. *Barony.*—In the dispositive clause must be described, by situation, boundaries or other distinctive characters, every individual subject in which it is intended to give sasine, for an omission cannot be supplied by means of other clauses. These serve not to convey the subject of the grant, but to perfect the feudal forms (*a*). Lands and other subjects, erected into a barony which is *nomen universitatis*, are excepted from the rule: they may be conveyed so as to admit of infeftment by the territorial name (*b*). It is true, that in some instances, where the subjects were sufficiently identified, the Court have held that the particular description might be supplied by the production of relative documents, and infeftment be thus obtained; but cases of this nature depend upon circumstances, and are not to be relied on by the conveyancer (*c*).

2. *Parts and pertinents.*—(1.) It is asserted by Craig (*d*) that the addition to the description of the lands, of the words, *cum pertinentis*, is unessential, and that pertinents follow the subject, by the rule, *accessorium semper sequitur suum principale ;* but as our decisions bear frequent mention of parts, pendicles and pertinents, and these terms form part of the common style of the dispositive clause, it is the safe course for the conveyancer to follow the practice. This opinion of Craig is not supported by Stair (*e*), who imputes a distinctive meaning to the words, parts and pertinents, in questions relating to the effect of possession. (2.) Parts and pertinents include every thing connected with or forming part of the lands, (except the *regalia,*) that is not specially reserved from the grant ;—such, for example, as mines of coal (*f*) ; the *solum* or bed of a lake (*g*) ; a right of pasturage upon other lands (*h*) ; trout-fishing in a stream forming the boundary of the lands (*i*) ; and likewise mills when not established as separate tenements, although contrary to the opinion of Stair (*k*). But they are not limited to what is above or below the surface : they comprehend tenements or pendicles, whether contiguous or separate, which have been possessed as part and pertinent for the prescriptive period (*l*). An example of a discontiguous pertinent is a seat in the parish-church, which, having been acquired by the proprietor of lands as sharing the burden of building the church, follows the property when conveyed to another (*m*). (3.) Where special description is practicable, it is generally advisable to employ it in deeds of conveyance.

3. *Bounding description.*—(1.) The acquisition of contiguous or separate tenements, as parts and pertinents, is excluded by the terms of the charter, when the vassal has what is styled a bounding infeftment, which confines the fee (*ager limitatus*) within the limits thus expressly assigned to it (*n*) ; such acquisition could only result from prescription, which implies both a title and possession conjoined. A bounding description has reference to marches, and not to measurement, which, unless limited by a taxative word, such as *only*, is held to be merely demonstrative, and is no bar to the acquisition of additional space by possession for the prescriptive

period (*o*). (2.) But this taxative effect of a bounding description does not exclude the operation of prescription so as to prevent another proprietor from acquiring a right to a subject within the limits, as part and pertinent of his lands (*p*). (3.) The vassal may follow the boundary when of a fluctuating nature, as a river, or receding like the sea. And such is presumed to be the boundary where the property consists of an island, or is notoriously situated on the sea-shore, or lies along the bank of a river. It is thus incompetent for another party, by artificial operations, to acquire or interpose property between the lands and such receding or fluctuating boundary (*q*).

(*a*) Shanks, 27th Jan. 1797, M. 4295.

(*b*) E. of Argyle, 15th Jan. 1668, M. 9631.

(*c*) Graham's Creditors, 3d August 1753, M. 49; Belches, 21st Jan 1815, F. C.

(*d*) Craig, 2. 3. 24.

(*e*) Stair, 2. 3. 73.

(*f*) Craig, 2. 8. 17; Stair, 2. 3. 74; Ersk. 2. 6. 5; L. Burley, 30th Jan. 1662, M. 9630.

(*g*) Stair, 2. 3. 73; Dick, 16th Nov. 1769, M. 12,813; Baird, 2d Feb. 1836, D. 14. 396.

(*h*) Borthwick, 14th Feb. 1668, M. 9632.

(*i*) Carmichael, 20th Nov. 1787, M. 9645; Mackenzie, 26th May 1830, F. C.; 8 S. 816; affirmed, 10 S. 864, App. 2.

(*k*) Stair, 2. 3. 71; Ramsay, 17th June 1777, M. App. *Part and Pert.* 1.

(*l*) Craig, 2. 3. 24; Stair, 2. 3. 73; Ersk. 2. 6. 3; Countess of Moray, 20th Feb. 1675, M. 9636; Magistr. of Perth, 19th Nov. 1829, F. C. 8 S. 82.

(*m*) Duff, 29th June 1769, M. 9644; Peden, 21st Nov. 1770, M. 9644.

(*n*) Stair, 2. 3. 73; Ersk. 2. 6. 3; Young, 21st June 1649, B. S. 1. 390; Thomson, Feb. 1688, B. S. 2. 118; Young, 17th Nov. 1671, M. 9636; Tillicoultry, 5th Dec. 1701, M. 12,743.

(*o*) Ure, 26th Feb. 1834, S. 12. 494.

(*p*) Ersk. 2. 6. 3.

(*q*) Campbell, 18th Nov. 1813, F. C.; M. of Tweeddale, 14th May 1822, S. See Macalister, 7th Feb. 1837, F. C. 15 D. 490; Suttie, 26th May 1837, D. 15. 1037; Fisher, 3d June 1836, 14 D. 880.

48. ACCESSORY RIGHTS.—It is foreign to the purpose of this work to describe the various kinds of rights implied in the conveyance to the vassal. Reference is made to our institutional writers. These rights were of old enumerated in the *tenendas* clause, which still, although uselessly, contains them in charters from the Crown. The redundancy of the *tenendas*

seems to have increased (*a*) from a desire to prevent disputes between superior and vassal, in regard to those rights and privileges which it was intended to confer on the latter, and to be reserved by the former; but as the rule is now firmly established, that all the ordinary rights of property are conferred on the vassal, unless in so far as specially reserved, the anxious enumeration of the old *tenendas*, even if contained in the dispositive clause, would be superfluous.

(*a*) Ross, 2. 165-6.
(*b*) Ersk. 2. 6. 4.

49. WHAT RIGHTS MUST BE EXPRESSED.—There are certain rights, which although intimately connected with, and truly parts and pertinents of land, yet as appropriated to the Crown or the Church by the laws and feudal customs of Scotland, are in the ordinary case understood to be excepted from the feudal grant (*a*).

1. *Regalia in general.*—The regalia are divided by Mr Erskine into *majora* and *minora*. The former, such as the royal prerogative and the Sovereign's right of superiority, are incommunicable to subjects; at least they are not communicable without the interposition of Parliament, such as the annexed property of the Crown. The latter consist of the right of waifs, forfeitures or feudal casualties, and of the succession of the Crown as last heir and to bastards; but chiefly of that class of rights which have been alluded to as truly pertinents of land. These are *baronial jurisdictions*, *forests*, *salmon-fishings*, *gold* and *silver mines*, and the rights comprehended under the term *res publicæ*, viz. *navigable rivers*, *ports*, *ferries*, *highways*, *fortalices*, *seagreens* and *shores*. Some of these, such as navigable rivers and highways, cannot become private property; but all the other regalia of this sort may be acquired by individuals by express grant from the Crown, or by prescription (*b*). With the single exception of salmon-fishings, they may be regarded as *extra commercium*.

2. *Salmon-fishings.*—(1.) At an early period it was thought that the right of salmon-fishing was *inter regalia* only where the sea filled, or salt water came, or where the fishing was with a coble or a trail net; otherwise that it

passed under a clause *cum piscationibus* (*c*); but this view, although supported by a recent authority, has been rejected by the Court (*d*). (2.) Our institutional writers are generally agreed that this right cannot be directly acquired as part of an ordinary fee, unless by a grant from the Crown containing the words *cum salmonum piscationibus*, or equivalent terms; but that a charter *cum piscationibus* simply may be interpreted to mean a grant of salmon-fishings, by possession for the prescriptive period of forty years (*e*). The terms which have been sustained as equivalent to *salmonum piscationibus*, are *cum piscariis*, which appear of old to have comprehended all sorts of fishings, and *piscationibus tam in mare quam in aquis dulcibus*, from their wide meaning (*f*). (3.) As opposed to an ordinary holding, our older writers have instanced a barony, as carrying with it the most of the *regalia*, without being expressed, and among others the right of salmon-fishing (*g*); and this opinion would appear to have been generally entertained at an early period (*h*). Lord Stair (*i*) goes the length only of regarding a barony as a title to salmon-fishings without prescriptive possession, where the grant contains the common clause *cum piscationibus*; but even this modified opinion is controverted by Mr Erskine (*k*), who appears, however, to concede, that a barony is a good prescriptive title in itself without mention of fishings. And there seems to be no recent authority for carrying the notion higher. The result to the conveyancer is, that where salmon-fishings are to be conveyed along with lands, they ought to be expressly mentioned, even although the lands have been erected into a barony. (4.) The exercise of possession by rod and spear, or any possession less slender than by net and coble, is insufficient to explain a conveyance *cum piscationibus* merely, to import a grant of salmon-fishings (*l*). (5.) It is not essential to the validity of a grant of salmon-fishings that it flow immediately from the Crown: the right may be transmitted by sub-feu (*m*); and it flows from the nature of the positive prescription, which operates even against the Crown (*n*), that a conveyance *a non domino*—from a party not in right of the subject, is a sufficient prescriptive title, if, in the dispositive clause, it bear *with salmon-fishings*, or *with fishings* merely (*o*).

3. *Teinds.*—Teinds or tithes are a separate subject, *(separatum tenementum,)* and are sometimes granted to a vassal in a feu or blench charter of the lands. When feudalised they must be expressly conveyed. (1.) There are three classes entitled to grant a conveyance of teinds; *first*, those having rights *cum decimis inclusis et nunquam antea separatis*, prior to the Act of Annexation of 1758 (*p*); *secondly*, titulars, to whom belong the free teinds of the parish, or those teinds (so far as not assigned to the minister) to which there are no heritable rights; and, *thirdly*, proprietors having heritable rights to their teinds by grant or prescription—rights, in other words, which exclude the right of the titular. (2.) An heritable right to teinds may be personal or feudal. Originally, teinds seem to have been universally held by a personal right (*q*); and when not feudalised, they may still be vested in a disponee of the lands, without infeftment, and that not only by express words, but by terms from which intention can be fairly inferred (*r*). Where, again, they have been once feudalised, teinds must be formally disponed by such terms, as *with the teinds of the said lands*, or *with teinds, parsonage and vicarage*, and the conveyance completed by infeftment. (3.) The word *teinds* is the essential term; it includes all the ordinary tithes of grain. Vicarage teinds *(decimæ minores)* are due from animals, herbs, &c. and seem now to be considered as purely customary (*s*).

(*a*) Ersk. 2. 6. 13.

(*b*) Ersk. 2. 6. 13, and foll.

(*c*) Leslie, 29th June 1593, M. 14,249; Gairlies, 30th July 1605, M. 14,249.

(*d*) Bell's Princ. § 671-1100; D. of Sutherland, 11th June 1836, F. C., 14 D. 960.

(*e*) Craig, 2. 8. 15; Stair, 2. 3. 69; Ersk. 2. 6. 15.

(*f*) Forbes, 3d Dec. 1701, M. 14,250.

(*g*) Craig, as last cited; Mack. 2. 6. 3.

(*h*) See argument in E. of Argyle, 15th Jan. 1668, M. 9631.

(*i*) Stair, 2. 3. 69.

(*k*) Ersk. 2. 6. 18.

(*l*) Chisholm, 17th June 1801, M. App. Salm. Fish. 1; and cases referred to as not reported; D. of Sutherland as above, and cases in notes.

(*m*) See Magistr. of Inverness, 27th Jan. 1775, M. 14,257.

(*n*) 1617, c. 12; Ersk. 3. 7. 31.

(*o*) Brown, 16th Jan. 1680, M. 10,844.

(*p*) Ersk. 2. 10. 16; Hay, 7th Feb. 1810, F. C.; Auchterloney, 23d May 1810, F. C.

(*q*) See Dunning, 5th July 1748, (Kilk.) M. 15,659.

(*r*) Ersk. 3. 7. 3-4; Connell, 2. 246; Learmonth, 26th June 1829, F. C., S. *(Teinds,)* 192.

(*s*) Ersk. 2. 10. 13; Hunter, 9th March 1796, M. 15,728.

50. RESERVATIONS BY SUPERIOR.—1. *Power to divide the superiority.*—Certain rights are by law inherent in the *dominium directum*, and need no reservation by the superior. These are the *essentialia feudi*—the essential qualities of the fee. Those called *naturalia feudi*, which are natural to, and form part of the feudal contract unless otherwise agreed on, may receive an alteration from the will of the parties without destroying that contract, if intention be properly expressed in the grant itself; and in modern practice the proper part of the deed for this purpose is the dispositive clause (*a*). One of the natural properties of a fee is the indivisibility of the *dominium directum* without the consent of the vassal (*b*); and as a consequence, when a superior dies leaving daughters only, the ordinary rule of law, that heritage divides among heirs-portioners, is suspended, and the right of superiority goes to the eldest (*c*). A vassal, therefore, applying for a renewal of the investiture, is entitled to an entry from the eldest of a set of heirs-portioners; at least he is not bound to accept of more than one charter or precept (*d*). The same rule holds where two or more parties are joint proprietors *pro indiviso* of a right of superiority (*e*). Where, therefore, the superior wishes to have the power of dividing or splitting his fee, it is necessary that he reserve it in express terms (*f*). Of late, however, this privilege of splitting has become of little or no value, except in the division of feu-duties. The creation of county votes, which were attached to superiorities of a certain value under the old system of election, was a plentiful source of the division of those rights.

2. *Mines and minerals.*—The superior often reserves a right to the mines of coal, freestone, and other minerals within the lands. This reservation ought to be expressed in very explicit terms, so as to comprehend those precise substances, and no others, which, by the agreement of parties,

are to be excepted from the grant. An example of the clause is given in the notes (*g*). The form will of course be adapted to the peculiar nature of the substances known or suspected to belong to the lands (*h*). Mines of gold and silver were, by an old statute (*i*), given to the Crown; but by an unprinted act, passed in 1592, (No. 12,) all mines which were thus *inter regalia* are disannexed from it, and power is given to the Sovereign to grant them in feu-farm to the *freeholder* of the lands, a term which has been interpreted to mean the vassal, whether immediate or remote, who is actual proprietor, on payment of a tenth of the free proceeds to the Crown; and the terms of the act are held to vest a positive right in such proprietor to demand and enforce a grant from the Sovereign (*k*).

3. *Right of pre-emption.*—It may be the object of a superior granting a feu-right to re-acquire the *dominium utile*, in the event of the vassal or his heirs wishing to dispose of it. This is provided for by a clause of pre-emption (*l*). As the power of alienation is now inherent in a feudal right (*m*), a mere prohibition to convey, without, in the first instance, making offer of the subject to the superior, is ineffectual to prevent disposal to another for onerous considerations. To accomplish his object, the superior must guard the prohibition with a clause irritating (forfeiting) the vassal's right, and declaring all deeds of transmission to be null and void (*n*). But as a superior cannot, by force of words, overcome the statutory abolition of the power to prohibit alienation without consent, a right of pre-emption may be reserved to the effect only of binding the vassal to offer back the lands to the superior at their market value, or on such terms as can be got from another. It has accordingly been adjudged, that a clause of pre-emption at a fixed price is ineffectual against onerous disponees, as being substantially of the nature of the stipulation *de non alienando sine consensu superiorum* (*o*), which it was the object of the Legislature to abolish.

(*a*) Craig, 1. 9. 27; Ersk. 2. 3. 11, 23; Jur. Styles, 1. 16. and fol.

(*b*) F. 2. 55, § 1; Craig, 2. 11. 18; Stair, 3. 5. 11; Ersk. 2. 2. 12; D. of Montrose, 31st Jan. 1781, M. 15,017, affirmed on appeal; Maxwell, 9th June 1741, Elch. *voce* Sup. and Vas. 4; Graham, 23d May 1826, F. C.,

4 S. 615; Craig (2. 14. 7.) is of opinion, that feu-duties are divisible in the special case of heirs-portioners, although he does not maintain the divisibility of the right of superiority itself. His opinion is controverted by Lord Stair, (3. 5. 11.)

(*c*) Baillie, 14th June 1678, B. S. 3. 234.

(*d*) L. Luss, 30th July 1678, M. 15,028.

(*e*) Jamieson, 21st Jan. 1837, F. C., 15 D. 408.

(*f*) But provided always, as it is hereby expressly provided and declared, that it shall be lawful to me, my heirs and successors, to divide, alienate, dispone, and convey at pleasure the superiority or *dominium directum* of the subjects hereby disponed, in such shares and proportions, and to such person or persons as we shall think proper, without the concurrence of the said B., or his foresaids, who, by accepting hereof, agrees for himself and his foresaids to such splitting of the superiority, and consents to their holding under as many superiors as I or my foresaids shall think fit to interpose between them and my own superior, any law or practice to the contrary notwithstanding.

(*g*) Reserving always to me, and my heirs and successors, the whole mines, minerals, metals, fossils, coal, limestone, freestone, slate, marble, and other stone, whether ornamental or for building, within the lands hereby disponed, and full power and liberty to us, or any person or persons authorised by us, to search for, work, win, and carry away the same, and to make aqueducts, levels, drains, quarries, roads, and others necessary for all or any of these purposes, upon payment of such surface damage as shall be ascertained by two persons to be mutually chosen by the superior and vassal.

(*h*) Menzies, 10th June 1818; affirmed, 17th July 1822, 1 S. 225. This case shews the propriety of specifying the kinds of substances intended to be reserved. The one party maintained that mines and minerals include *coal*, *marl*, *lime*, *clay*, *marble* and *other ornamental building stone*; the other, that they mean substances useful on account of their specific or chemical qualities, such as *metallic ores*, *marble*, *lime*, *coal*, &c. in contradistinction to mere mechanical masses, such as stones for building.

(*i*) 1424, c. 12.

(*k*) D. of Argyle, 7th Dec. 1739, M. 13,526; E. of Hopetoun, 4th Jan. 1750, M. 13,527; Ersk. 2. 6. 16.

(*l*) It is hereby provided and declared, that it shall not be lawful to, nor in the power of the said B., or his foresaids, to sell, alienate and dispone the said lands and others, or any part thereof, to any person or persons, until he or they have first offered to sell the same to me or my foresaids, at the like rate they might get from any others: And if the said B., or his foresaids, shall fail to offer the same to me, or my foresaids, as before provided, then and in that case, not only shall the right and infeftment to be granted by him or them to any person or persons be void and null, but also the said B., or his foresaids, so contravening this present provision and declaration, shall thereby forfeit and lose their right and title to the foresaid lands and others, or any part thereof so attempted to be sold and disponed, and the same shall fall and return to me or my foresaids, as if these presents had never been granted.

(*m*) 20. Geo. II. c. 50.

(*n*) Ersk. 2. 6. 13.

(*o*) Farquharson, 2d Dec. 1800, M. App. *Clause*, 3; overruling the autho-

rity of Irving *v.* M. of Annandale, 6th March 1767, M. 2343. The clause in Farquharson was expressed as follows: "And likewise, with the special provi- "sion and condition, that in case it shall happen the said B., his heirs or assig- "nees above contained, to sell, annailzie and dispone the heritable right and "title of all and haill, without the consent of the said A., his "heirs and successors, and also not offer the said to the said A. "and his foresaids, before the alienation and disposition thereof, for refunding "and paying back again by the said A., and his before mentioned, to the said "B. and his above specified, the before-named sum of above "written, presently paid and delivered by the said B. to the said A. and his "spouse, then and in that case, and no otherwise, the said charter and infeft- "ment of feu-farm, with the bond and obligation above written for making "thereof, shall be null, extinct, expired, cassed, and of no farther avail, "strength, force nor effect, with all that may follow thereupon." There is here a *resolutive* without an *irritant* declaration; but the discussion did not turn on this omission.

51. RESTRICTIONS ON THE VASSAL'S RIGHT.—1. *General nature.*—The term *restrictions* is here employed in a wide sense, to import all stipulations of whatever kind, whereby the vassal is restrained in those uses to which a feudal subject may be applied, or taken bound to perform certain things in relation to the subject at the pleasure of the superior. Limitations on the right are thus various. (1.) Real burdens of sums of money may be imposed in favour of the superior or a third person, by the use of certain terms in the dispositive clause, if transferred to the sasine and the register, and nothing more is necessary to make them attach to the fee, in the hands even of a singular successor; but such burdens are not usual in original charters, although frequently introduced in dispositions of sale and deeds of settlement. (2.) Stipulations for executing certain operations, *e. g.* the erection of houses or fences, or making or repairing streets, which resolve substantially into pecuniary obligations, may, it is thought, be, on the same principle, made real by declaring that a fixed sum out of which the necessary outlay may be defrayed, (if the vassal should refuse or delay to implement his obligation,) shall form a real burden on the right. So far, there seems to be little difficulty in the way of the conveyancer. (3.) Thus also servitudes duly constituted, so as to give conterminous or neighbouring feuars a right to enforce them as legal restrictions on their mutual rights, are effectual against singular successors. (4.) But there are various stipulations usually

introduced in modern grants by charter or feu-contract, of building ground, some positive—to be performed, others negative—to be avoided, by the vassal, but all of them incapable from their nature of being made available out of the subject or its fruits, as to which no fixed rules have yet been laid down for the determination of questions occurring between the superior and singular successors in the fee. These, as well as many of the provisions above referred to, have risen into importance in crowded communities, for the preservation, on the one hand, of the rights of the superior, and, on the other, for the regulation, by a sort of architectural code, of the mutual interests as well as the comforts of the citizens. Until a comparatively recent period, such regulations were difficult of introduction; for in all the ancient towns, the property is held by the tenure of burgage, which, in a practical sense, is nearly allied to an allodial system, and the royalty lands are besides generally divided into minute portions. Hence, it is only in the suburbs of the burghs, and in towns and villages recently built, where the ordinary holdings prevail, and subinfeudation is therefore competent, that the rights of superiors have been called into operation, in the establishment of a regulating code.

2. *Uncertain state of the law.*—Our older authors, who wrote before the feudal system of conveyancing had been adapted to the regulation of building operations, had thus in view the transmission of considerable portions of land. Lord Stair seems to indicate an opinion, that where the feudal right has become vested in the vassal, irritancies which do not depend upon statute or feudal usages, but on private paction merely, do not affect singular successors; and he instances reversions, alienations of the fee without consent of the superior, and non-payment of feu-duties, as grounds of recognition or forfeiture by law or custom (*a*). There may be added the statutory irritancies of the strict entail. Of these, clauses *de non alienando sine consensu superiorum* were absolutely abolished by the statute which gives a title to disponees to demand an entry from the superior (*b*). Still the effect of an irritancy, both annulling the conveyance and resolving the right of the vassal, (equivalent to the irritant and resolutive

clauses of the strict entail), was deemed so strong, that a clause of pre-emption thus fenced was enforced after the date of the enactment (*c*); but in a later case, the Court held that the right of a singular successor under the statute could not be discharged by any compact between the superior and his immediate vassal (*d*). The question, how far a pactional irritancy is effectual against a singular successor, does not appear to have again directly occurred before the case of Campbell, in 1823. There the majority of the Court held, that an irritant (without a resolutive) declaration to affect a vassal granting a deed of conveyance not prepared by the superior's agent, was valid as against a purchaser, and the deeds executed contrary to the stipulation in the feu-contract were set aside; but in the House of Lords, a remit was made in order to obtain the opinion of the Judges, and the case was compromised. More recently, the effect of restrictions, in a question with a singular successor, has been largely discussed both in the Court below and the House of Lords, and the views of the learned Judges before whom the case came deserve a careful perusal (*e*). The terms of the remit made by the Court of Appeal for the opinion of the Judges is sufficient to shew the uncertainty of the law on a subject of so much importance to the conveyancer. The points still considered open seem thus to be the following: *first*, Are there any burdens, (with the exception, of course, of feu and blench duties,) that can be made to qualify the fee in the hands of a singular successor, although not declared in terms to be real burdens? *secondly*, Are stipulations, (not proper money stipulations,) whether positive or negative—to do, or refrain from doing certain things having relation to the subject, capable of being made real so as to affect singular successors, with or without an irritancy? *thirdly*, Does an irritancy in any instance supply the place of express declaration that a stipulation is intended to be made real, so as to make it effectual without such declaration? and, *lastly*, Is it essential to the effect of an irritancy, that it bear a declaration resolutive of the right of the vassal or disponer,—that the clause, in short, contain both irritant and resolutive words?

3. *Superior must have an interest.*—(1.) All limitations

of the right of property being discountenanced, they seem to be ineffectual against third parties, unless where a manifest interest of a proper patrimonial nature is reserved to the superior. Thus it has been ruled that a prohibition against digging for stones, &c. or "using the ground in any other way than by "the ordinary labour of plough and spade," is inept as against a singular successor, to prevent the erection of buildings (*f*). Extensive ranges of streets in large towns may be formed in particular lines, by the division of the feuing ground into lots; but clauses for the regulation of each individual building, by reference to a particular plan and elevation, are inoperative. The superior cannot prevent the unlimited erection of buildings of any possible structure and height, so long as the vassal keeps within his own boundary, and is not liable to the objection of nuisance, without an express restriction in the charter itself; and such restriction even will not avail the superior, unless he have a clear interest, and thereby a title to object to the unrestricted use of the subject for building (*g*.) (2.) It is another question, how far feuars, by a mutual contract or other valid mode of constitution, may oblige themselves and their heirs to adhere to a particular plan; but it seems to be doubted if an obligation of this nature, although binding on the parties and their heirs *ex contractu*, would introduce restrictions differing from the ordinary servitudes recognised by law, so as to affect creditors or onerous disponees (*h*).

4. *Prohibition to sub-feu.*—(1.) The most important restriction usually imposed on vassals in subjects feued out for building is that against sub-infeudation. To receive due effect, it must be expressed in the dispositive clause, and transferred to the sasine and the register. The introduction of this stipulation in modern conveyancing has been of the greatest importance to the inhabitants of the newer parts of large towns, its practical effect enabling the superior to enforce stipulations which are generally found to operate for the interest of the body of feuars and their tenants and disponees. (2.) It has not hitherto been in express terms decided that the prohibition to sub-feu is effectual against creditors and other singular successors; but in the case of Campbell it seems to have been regarded by all the Judges as a valid stipulation,

and not inconsistent with the enactment which annuls clauses *de non alienando* (*i*). The restriction to one particular form of alienation is deemed a competent mode of enforcing an onerous contract, a character which the feudal relation bears whether constituted by charter or feu-contract. At the same time it is unquestionable, that a prohibition against sub-infeudation, although not an absolute bar to alienation, is a clog on the vassal's free and uncontrolled use of the property. Sub-infeudation is, in particular situations and circumstances, the only form of alienation which is available, or can be productive of any advantage to the proprietor. He may be enabled to grant sub-feus of minute portions, when he could not dispose by sale of any part of the subject. It is therefore of much importance that the question should be set at rest. As the law stands, the conveyancer will act prudently in fencing the prohibition in the strictest form, by means of a clause both irritant of the deeds done in contravention of the prohibition, and resolutive of the right of the vassal or disponer (*k*).

5. *Provision for the entry of disponees.* — Connected with the prohibition to sub-feu, there is usually introduced a condition, that the disponees of the vassal shall enter with the superior within a fixed period after the date of the conveyance. The propriety or advantage of such a condition may perhaps be doubted, supposing it to be effectual as against third parties. If the validity of the prohibition to sub-feu shall ultimately be sustained, then it follows that a disposition, with an alternative holding, *a me vel de me*, will be inept where sub-infeudation is excluded, since infeftment on a precept of sasine having relation to such a holding, would, until confirmation, create a base right, which, by the assumption, is excluded. Where, again, the holding must necessarily be public, *a me*, it could be of little practical importance to provide that disponees should take immediate entry, a step which every prudent purchaser or creditor will voluntarily adopt, where the effect of delay may be to give a preference to a second disponee or bondholder, or an adjudger. But if that prohibition shall be found inconsistent with the statute of Geo. II., a provision for immediate entry would introduce an artificial non-entry unknown to the feudal law (*l*), of which the effect would pro-

bably be, where the composition due by disponees is not a mere elusory payment but the legal fine of a year's rent of the subject, to limit in no inconsiderable degree the value of property subject to the restriction. It is understood that on the Blytheswood estate this provision is in full and systematic operation; but the entry is taxed at a penny Scots, and disponees have thus but little interest in opposing it.

6. *Provision in regard to deeds of transmission.*—A stipulation that deeds of conveyance shall be prepared by the superior's agent, has been viewed as highly dangerous to the superior, and its validity cannot be considered as fixed (*m*). It is believed that the superior in whose case its effect was tried has entirely departed from it. This provision is not of the nature of a pecuniary burden, which can be made real by entering the sasine and the register; and, therefore, when introduced in a feu-charter or feu-contract, it ought to be fenced with proper irritant and resolutive clauses.

(*a*) Stair, 1. 14. 5.

(*b*) 20 Geo. II. c. 50.

(*c*) Irvine, 6th March 1767, M. 2343.

(*d*) Farquharson, 2d Dec. 1800, M. App. *Clause*, 3.

(*e*) Tailors of Aberdeen, House of Lords, 23d May 1837, S. and M'L. 2. 609.

(*f*) Heriot's Hospital, 30th July 1773, M. 12,817.

(*g*) Heriot's Hospital *v.* Gibson, 4th May 1814, 2 Dow, 301; Gordon, 9th and 16th Feb. 1818, 6 Dow, 87; Walker, 11th March 1825, F. C., 3 S. 650; Pollock, 16th Jan. 1827, F. C., 5 S. 195; Brown, 14th May 1823, 2 S. 298.

(*h*) See Cockburn, 9th Dec. 1826, F. C., 1st July 1825, 4 S. 128, and 23d May 1826, 2 W. S. 293.

(*i*) Campbell, 23d May 1823, F. C., 2 S. 341, remitted, 29th June 1825, 1 W. S. 690, abandoned, (see opinions of Judges), 4th March 1828, 6 S. 679.

(*k*) See Farquharson, as above; Stirling, 4th Jan. 1757, M. 2342; Creditors of Hepburn, 8th Feb. 1758, M. 15,507.

(*l*) Ersk. 2. 5. 44; Gardiner, 7th March 1799, M. 15,037.

(*m*) See Campbell as above.

52. IRRITANCY OB NON SOLUTUM CANONEM.—It was at an early period not unusual to introduce in feu-rights a clause irritating the right, or declaring the tinsel of the feu, by the vassal's delay in payment of the feu-duty for two full years; and an act was passed (*a*) forfeiting the rights of all vassals in feu-farm, in the same manner as if a clause irritant

were specially engrossed in their infeftments. (1.) It is plain that this statute was intended to introduce a legal forfeiture of the same scope and nature as the conventional irritancy then in use, but the Court at first attributed greater force to a clause irritant than to the statute, on the ground that the clause would have otherwise been unmeaning (*b*). Lord Stair (*c*), however, attributes the same effect to the statutory and conventional forfeitures, which are equally penal, in accordance with the words of the act; and the distinction noticed by Mr Erskine, and expressed in some early cases, that the vassal may escape the penalty of the statute by payment before decree in a process of declarator, or, as it is called, purging at the bar, whereas that stipulated in a feu-right is absolute, or, in other words, incurred *ipso jure*, has not been sanctioned by the Court (*d*). In either case the vassal may avoid the forfeiture by paying before extract (*e*). (2.) Where it is the intention, therefore, to rest satisfied with the forfeiture incurred by delay in payment of the feu-duty for a period of two years, it is superfluous to introduce an irritant clause into the charter; and, for a similar reason, it is necessary that the superior shall renounce the forfeiture in express terms, if it is meant to exclude its operation (*f*). Such renunciation, to be effectual against the singular successors of the superior, must be made real by insertion in the sasine following on the charter, and the register (*g*). (3). A superior who obtains a declarator of irritancy, and thus acquires the fee which belonged to the vassal, cannot sue for bygone feu-duties (*h*). (4.) This irritancy is not a proper casualty of superiority, but a statutory forfeiture of the grant.

(*a*) 1597, c. 250. Our Soveraine Lord and Estaites of this present Parliament haveand consideration of the great damnage and skaith quhilk his Majesty and lieges of this realme susteints throw evill and untimous payment of the feu-dewties of their landes set in few-ferme Therefore statutis and ordainis that in case it sall happen in time cumming ony vassall or fewar haldand landis in few-ferme of our Soveraine Lord or of any other superior immediately in few-ferme to failzie in making of payment of his few-dewtie to our Soveraine Lordis comptroller or uther havand power of him or to uther immediate superiour or uthers havand power of him, be the space of two zeires haill and togidder that they sall amitte and tine their said few of their saids lands conforme to the civil and cannon law sicklike and in the same manner as gif any clause irritant were specially ingrossed and insert in their said infeftmentis of few-ferme.

(*b*) Ersk. 2. 5. 27.

(*c*) Stair, 1. 17. 16. and 2. 3. 51.

(*d*) Drummond, 23d March 1686, M. 7235; Lockhart, 14th Nov. 1770, M. 7244.

(*e*) See as to effect of decrees in absence, Campbell, 16th Jan. 1777, M. 7252; Campbell, 7th March 1794, M. 321.

(*f*) Jur. Styles, 1. p. 19. And it is hereby provided and conditioned, that although the feu-duty herein-after specified shall remain unpaid for the space of two years or upwards, yet it shall not, on that ground, be competent to me or my foresaids to sue for or declare an irritancy against the said B. or his foresaids, or to resolve their rights to the said lands and others, our power to do so being hereby expressly renounced, any law or practice to the contrary notwithstanding.

(*g*) M'Vicar, 10th Feb. 1749, M. 4180.

(*h*) M'Vicar, above; Magis. of Edin. 16th May 1834, F. C., 12 S. 593.

53. PROVISION IN REGARD TO SUBSTITUTES OF ENTAIL.—It is no longer necessary to stipulate that the superior may refuse to enter a corporation (*a*). But where the vassal conveys the property to a series of heirs, among whom may be persons who are not his heirs of line, it becomes of importance to the superior to provide that he shall not be deprived of his casualties by the continued succession of the substitutes of tailzie *qua* heirs. (1.) By the statute relative to entails (*b*), the heirs and substitutes of tailzie are deprived of the power of alienation, and creditors of the right to adjudge the lands; but there is no provision in the statute for enforcing the acknowledgment by the superior of the series of heirs to whom they are destined. It must, however, be observed, that his refusal to recognise the entail could have received no support from the clause of the statute which reserves entire his right to the casualties of superiority, for, at that period, the title of the superior to demand a year's rent as the composition for the entry of a voluntary disponee had not been sanctioned by the Legislature. (2.) This defect in the statute of 1685 was remedied by the act of George II. (*c*), which provides a mode of enforcing an entry from the superior by any person who shall *purchase* lands, and obtain a disposition containing a procuratory of resignation; but although practice has sanctioned the right to compel an entry by any one who holds a procuratory of resignation, although not a purchaser of the lands, it does not follow that a disponee having a legal right

"to new infeftment in his favour," may require the superior to grant a charter embracing a series of heirs different from his own heirs whomsoever. (3.) In so far, therefore, as the question rests on the words of the statutes, it has been doubted if a superior is at all bound to recognise an entail which contains a series of heirs embracing persons not the heirs of line of the entailer; but the superior has, perhaps, no legitimate interest to push the question farther than a reservation of his right to the composition of a singular successor on the entry of every stranger heir of tailzie. The Court have, however, avoided a decision of the point in those cases which have occurred, by reserving it for consideration, when a substitute of entail, not the heir of line of the person last infeft, should demand an entry (*d*). In this state of the law, it is plainly the duty of the conveyancer to adopt the clause which has been sanctioned by the Court (*e*).

(*a*) Hill, 17th Jan. 1815, F. C.

(*b*) 1685, c. 22.

(*c*) 20 Geo. II. c. 50.

(*d*) M'Kenzie, 4th July 1777, M. 15,053; D. of Argyle, 19th Nov. 1795, M. 15,068; see Lockhart, 10th July 1760, M. 15,047; and opinion of Lord Corehouse in D. of Hamilton, 22d Nov. 1827, D.

(*e*) The reservation in D. of Argyle, above, was in these terms: "That the "said Duke, by granting this present charter, does not exclude himself, or his "heirs, from any claim which he or they may have at law to a full year's rent "of the lands herein contained, whenever the heir of entail, to whom the "succession shall open, shall happen not to be the heir of line of the person "who was last entered and infeft by the said Duke and his foresaids."

54. CONDITIONS OR RELAXATIONS IN FAVOUR OF THE VASSAL.—1. *Renunciation of casualties.* It is equally competent for the superior to give as to reserve such privileges as are only natural and not essential to the fee (*a*). Of these are the casualties of superiority, which may effectually be renounced by express words inserted in the dispositive clause (*b*).

2. *Power to buy up part of the feu-duty.*—As it is an essential character of fees, that the vassal acknowledge the superiority by stipulating some lawful service, or the payment of a sum of money, or the delivery of a certain article, yearly, such, however insignificant, must consequently, by the tenor of the grant, remain an obligation on the

vassal; yet in feu-holdings the duty may be vested in the vassal as a separate blench fee, by conveyance from the superior (*c*). But as the smallest and most elusory payment is sufficient to preserve the feudal character of the transaction, it is competent, and not unusual in practice, to introduce an obligation upon the superior to sell to the vassal a certain portion of the feu-duty at a fixed number of years' purchase. The insertion of the renunciation in this clause is required, in order that it may be transferred to the sasine and the register, and so form a real burden on the right of superiority (*d*).

3. *Power to apportion the feu-duty among disponees.*—It is not unusual in charters of property feued out for building, to introduce a clause (*e*) to sanction the division and apportionment of the *cumulo* feu-duty among the disponees of the vassal when the subjects are sold in lots. The same may be done to meet the case of sub-infeudation (*f*). Without such power of division, each purchaser or sub-feuar becomes liable as an intromitter in the full *cumulo* feu-duty; but he seems to have a title to require the superior to assign to him his right, to the effect of his obtaining relief and repayment from a co-vassal, or co-disponee, of sums paid over and above his own proportion (*g*).

(*a*) Ersk. 2. 3. 11.

(*b*) Nasmyth, 8th Nov. 1748, M. 10,276; Montgomery, 10th Feb. 1749, M. 10,251; M'Vicar, 10th Feb. 1749, M. 4180. The clause disponed "all "and sundry the casualties of the said lands that might fall or become, in the "hands of the superiors thereof, either as liferent-escheat, non-entry, or by "contingency of not timeous payment of the feu-duties thereof, by and through "the said B., and his heirs and successors being put to the horn the space of "year and day, or through the heirs of the said B. or his foresaids lying out "unentered to the same after the death of their predecessors, or by not time-"ous payment of the said feu-duty."

(*c*) Nasmyth, as above.

(*d*) Nasmyth, 17th June 1740, M. 10,276.

(*e*) Jurid. Styles, 1. 19.

(*f*) Jurid. Styles, 1. 20.

(*g*) Wemyss, 19th Jan. 1836, F. C., 14 D. 233.

55. TENENDAS (*a*).—(1.) The only purpose of the clause of *tenendas*, or as it was of old called, *clausula tenoris*, is to express the particular kind of holding in which the vassal re-

ceives the lands; but anciently, the *tenendas* contained an anxious enumeration of those accessory rights and privileges, which are now understood to pass as parts and pertinents of the fee. Their insertion appears at no period to have had any real force; and Craig (*b*) asserts that the clause was not originally in this extended form, which, as he says, was borrowed from the practice of the English. The immediate source from which the form was derived does not appear to be well ascertained. It is, however, apparent from the styles of ancient deeds, that the *tenendas* in use in Craig's time was a mere amplification by the clerks or notaries, the conveyancers of that period, of a clause (*c*) which had been common in deeds of transmission of fixed property since the time of the Empire. Until a comparatively recent period, this clause contained a repetition of the lands and the series of heirs in whose favour the grant was made. (2.) Since the introduction of the records, the *tenendas*, which is not transferred to the instrument of sasine, has become powerless for expressing limitations on, or the destination of the fee, for which the dispositive is the proper clause of the charter in modern conveyancing. The Court have accordingly held, that terms occurring in this clause are ineffectual to convey, as a separate right, a privilege not expressed in the dispositive clause, and incapable of being acquired as part and pertinent (*d*). But a servitude, such as thirlage, which is not a feudal right, but a bare quality annexed to lands, may be discharged by a clause *cum molendinis et multuris*, contained in the *tenendas* of a charter by the proprietor of the lands having right to the servitude (*e*).

(*a*) "To be holden, and to hold all and sundry the lands, teinds and others "above disponed, by the said B. and his foresaids, of and under me, and my "heirs and successors whomsoever, as their immediate lawful superiors of the "same, in feu (or blench) farm, fee and heritage for ever, by all the righteous "meithes and marches thereof, as the same lie in length and breadth, with "houses, biggings, &c. freely, quietly, well and in peace, without any revoca-"tion or obstacle whatever."

(*b*) Craig, 2. 3. 20.

(*c*) The following is an example of the specification of the accessories of land, taken from the Forms of Mabillonius, applicable to a district of France, and of great antiquity. The form contains an inductive clause, to the effect that the Roman law and ancient custom permit a man to give away his property for the

good of his soul; and it proceeds to convey, in very indifferent Latin, to a certain monastery, a small place, *(locello,)* "*cum terris domibus ædificiis mancipiis* "*accolabus vineis silvis pratis pascuis aquis aquarumque decursibus movilebus et* "*immovilebus junctis et appendiciis et adjacentiis in se habentis ad se pertinentis.*" This enumeration, varying according to the circumstances of the country and its climate, is found in all the ancient conveyances of the Franks and Germans, but in the proper dispositive clause, (see Forms of Marculfus, &c. in *Leges Barbarorum,*) and before these had been adapted to the feudal usages.

(*d*) E. of Aboyne, 16th Nov. 1814, F. C.

(*e*) Erak. 2. 9. 38; D. of Roxburghe, 21st July 1785, M. 16,070.

56. REDDENDO (*a*).—1. *General nature.*—The clause of reddendo, (so called from the first word of the Latin form,) as expressing the payment or duty exigible by the superior from the vassal, and out of the lands, is of great importance. Originally, when the services due by the vassal were of a military kind, they were regulated by the custom of each particular country or province. But when superiors came to grant their lands for profitable uses, it was necessary that the particular duties to be rendered or paid by the vassal should be expressed, in order to overcome the legal presumption in favour of military service. Since the abolition of ward-holding, the military tenure of Scotland, it is probable that the holding of feu-farm, as most favourable to the superior (*b*), would *in dubio* be presumed; but it is not easy to imagine an agreement to grant a subaltern right so defective, as to contain neither the holding nor the reddendo.

2. *Blench and feu duties.*—(1.) The *reddendo* in *blench-holdings* is merely nominal, such as a pair of gilt spurs, or a snow-ball at midsummer, but it is most generally a penny Scots. It is usually expressed *si petatur tantum*, (the last word not being essential) (*c*); in which case, or when the duty is a subject of yearly growth, the discharge of it is implied when it is not demanded within a year after falling due (*d*). The Crown vassals by blench-holding are relieved by statute (*e*) from payment or delivery of the duty, unless demanded within the year; but a contrary practice continued to prevail in Exchequer, founded on a principle sanctioned by a prior statute (*f*), that the Crown cannot suffer by the negligence of its officers (*g*); and from the trifling value of the duties, the practice does not appear to have been challenged. (2.) *Feu-*

duties are in money, grain, cattle, kain-fowls, &c., or services. Services may still be lawfully stipulated which are of a valuable description, or merely occasional, as carriages of fuel (*h*), attendance with a boat and rowers for the use of the superior and his family, and the like (*i*); but all services strictly personal and *quasi* military, such as hosting, hunting, watching and warding, are abolished by statute (*k*), and appointed to be converted into a yearly money payment, to be fixed by the Court. Those services which are legal, if exigible at a fixed time, are due only if demanded (*l*); and where a period is not mentioned, they must be demanded within the year (*m*). Articles stipulated in kind, (*canæ,*) when not delivered, must be paid for at the market prices of the several years in which they fell due (*n*). Where a feu-duty is prestable in grain, the superior is entitled to such grain, of the kind stipulated, as the vassal's industry and skill enable him to raise on the lands; and in the event of not delivery, he may exact the highest fiars' prices *in modum pœnæ* (*o*). Fuel deliverable by the vassal is still exigible, although the supply which the lands contained be exhausted, unless it is otherwise expressed in the reddendo (*p*). (3.) Feu-duties, whether prestable in money or in kind, must, according to Craig (*q*), be demanded by the superior, (contrary to the rule in liquid obligations,) and that upon the ground of the lands. But where the vassal is taken bound to pay or deliver to the superior, as in the common form of this clause, or the reddendo consists of grain or some other fungible, or of fuel for the use of the superior's family, the duty is exigible at the manor-place; and the vassal is not bound to carry it beyond the barony when the superior changes his residence (*r*). The vassal is not, however, relieved of this obligation by the decay of the mansion-house at which services are to be rendered: he must still perform them, if required, at its site (*s*).

3. *Duties are attached to the superiority.*—(1.) Feu and blench duties are in a feudal sense inherent in the grant. The charter must bear that a certain duty is payable in acknowledgment of the superiority, and this duty cannot be absolutely discharged (*t*). (2.) But there is no feudal incompetency in declaring that the duty shall be payable to a third party,

although this is not practised in original grants. The right which the Lords of Erection hold to the feu-duties of church lands is constituted in this form. The superiorities of these lands having been yielded back to the Crown, the feu-duties were reserved to the Lords of Erection, unless redeemed by the Crown at a rate fixed by King Charles I. and sanctioned by statute (*u*), and the right of redemption was afterwards renounced in Parliament (*v*). In the meantime, on the total abolition of Episcopacy, an act passed (*w*), which annexed the superiorities of all lands formerly held of the dignified clergy or any beneficed person, to the Crown, and made it unlawful to interpose any other superior between the Crown and the vassals in these lands; so that the vassals in ecclesiastical grants came thus to hold immediately of the Crown, but under the burden of the payment of their feu-duties to the Lords of Erection. By this means a statutory burden has been created in favour of parties not superiors of the subjects. These real burdens came usually to be transmitted by resignation in the hands of the Crown, although proper burdens by reservation may competently be conveyed by assignation, and the Court, by reason of the practice, held that assignation was not a valid form of transmission (*x*). (3.) This mode of making feu-duties payable to third parties, although merely statutory, and apparently inconsistent with feudal principles, appears to have weighed with the Court in a case which involved the question of feudal competency; and they sustained a disposition of feu-duties granted in favour of the vassal himself, to be held blench of the superior, as effectual to oblige a singular successor in the superiority to grant a charter with a *reddendo*, wherein the duty should be taken payable to the superior, *or the person in right under the conveyance* (*y*). (4.) Feu-duties may likewise be conveyed by a superior in the form of a subaltern grant, (called *feudifirma feudifirmarum.*) This was a common device in alienations of the patrimony of the Crown prior to the acts of annexation (*z*).

4. *Relief, or duplicand of feu-duty.*—(1.) The reddendo of feu-charters usually bears, that the feu-duty shall be doubled at the entry of each heir, and sometimes, by special agreement,

at the entry of each singular successor, (purchaser or other disponee not the heir of line); or that a fixed sum shall be paid by one or both, at the end of a certain period, (usually twenty-one years,) without regard to the situation of the fee; and that this payment shall be in lieu of "all other burden, "exaction," &c. With respect to the duplicand or *relief* due by an heir, it ought to be expressed in the charter, and such is the usual practice; for although Lord Stair, and after him Mr Erskine (*aa*), are of opinion that relief is due in feu-holdings, although not expressed, there are cases in which the Court have decided to the contrary (*bb*). (2.) In blench-holdings, the question is of no practical importance. (3.) The duplicand or casualty of relief (but not the feu-duty itself) may be renounced, or rather disponed, in favour of the vassal; (above, § 54, Art. 1.)

5. *Recovery of duties.*—(1.) It flows from the original nature of a feu-farm right, which may be considered a feudalised lease, (§ 37,) that the superior may prevent the impoverishment of the subject from which the feu-duty, if not elusory, is payable (*cc*), and has a right of hypothec for enforcing payment of it, as a landlord has against his tenant, over the fruits in rural (*dd*), and the *invecta et illata* in urban tenements (*ee*). The hypothec of the superior for his feu-duty is, from the nature of their respective rights, necessarily preferable to that of the vassal for his rent. (2.) Feu-duties may be recovered by means of a personal action against the vassal, who continues liable, even after having alienated the fee, until the superior has received, or been required to receive, the disponee (*ff*); and as the liability is consequent on the acceptance of a charter, a singular successor, by taking an entry, incurs a similar obligation, but only for the duties subsequently prestable (*gg*). The same personal liability attaches to an intromitter, for the duties of the years of his intromission, and consequently to a subvassal (*hh*), and also to a tenant, prior to his removal, to the extent of his current rent and arrears. Poinding of the ground is likewise competent as against a tenant, but to that extent only; whereas the moveables of the actual heritor or proprietor, whether subvassal or disponee, are affectable, even for bygone duties, to the fullest extent (*ii*). (3.) Adjudication of the *dominium utile* is competent for arrears

of feu-duties. (4.) A disponee of the vassal who assumes possession, even without completing a valid feudal title, thereby adopts the feu-right, and subjects himself in all its liabilities, and that although acting as trustee on behalf of creditors. The interest of the superior is not affected by the character in which the disponee has adopted the feu, who has his relief against his constituents (*kk*). (4.) Feu-duties do not bear interest without paction (*ll*).

6. *Modification, or taxing of composition.*—(1.) It is not unusual in the reddendo to fix the composition or entry payable by a singular successor at a certain sum less than the year's rent exigible by law; (above, Art. 2.) Such modification, or *taxing of the entry*, as it is styled, is effectual as between the superior and vassal, and their heirs, *ex contractu*, but not, it is thought, in a question with the singular successor of the superior, unless expressed in the dispositive clause (*mm*); (above, § 54.) (2.) In questions between the original parties or their heirs, the terms, if not express, will be interpreted against the vassal. Every limitation of the rights of superiority is *strictissimæ interpretationis;* and unless *singular successors* be intended by the plain meaning of the words employed, the statutory composition is exigible (*nn*). (3.) It is not the practice to notice in the reddendo the composition payable by a disponee, unless where it is taxed at a particular sum, or expressly renounced by the superior.

7. *Can a vassal refute?*—The question, if the vassal can refute or renounce his feu *invito superiore*,—without the consent of the superior, and thus relieve himself from duties prestable for succeeding years, has been variously answered. By the *Const. Feud.* (*oo*), this power in the vassal is distinctly recognised, and Craig (*pp*) expresses the opinion of others as well as his own in favour of the notion. Lord Stair's view is undecided (*qq*), and Mr Erskine gives no opinion on the point. In a recent case, the question has been determined upon principles arising out of the modern condition of superior and vassal in relation to one another, which is that of parties to a mutual contract, perfected, as respects the vassal, by acceptance of the charter and possession of the subject. The Court and consulted Judges were nearly unanimous in the opinion, that the vassal cannot refute so as to relieve him-

self of his obligation for future duties (*rr*); and the same rule applies to a disponee who has adopted the feu-right; (Art. 5).

(*a*) "GIVING therefor yearly the said B. and his foresaids for the lands "and others above disponed to me and my foresaids immediate lawful supe- "riors of the same the sum of L. in name of feu-duty at two terms in "the year Whitsunday and Martinmas by equal portions beginning the first "term's payment at Whitsunday next for the half year preceding and so forth "thereafter at the said two terms in the year in all time coming and DOUBLING "the said feu-duty the first year of the entry of each heir to the lands and others "foresaid and these for all other burden exaction demand or secular service "whatsoever which can be any ways exacted for the lands and others foresaid "or any part thereof in all time coming."

(*b*) Stair, 2. 3. 33; Erak. 2. 4. 7; Bell's Pr. § 684.

(*c*) Semple, 16th Feb. 1627, M. 5447.

(*d*) Stair, 2. 3. 33; Erak. 2. 4. 7.

(*e*) 1606, c. 14; Erak. 2. 4. 7.

(*f*) 1600, c. 14.

(*g*) See Stair and Erak. last cit.

(*h*) Munro, 20th June 1763, M. 14,497.

(*i*) D. of Argyle, 5th Feb. 1762, M. 14,495.

(*k*) 1 Geo. I. c. 54, § 10.

(*l*) Wedderburn, 26th June 1606, M. 2156; D. of Hamilton, 15th Dec. 1835, F. C., 14 D. 162, affirmed, 2 S. and M'L. 586.

(*m*) Young *v.* Feuars of Kinross, 13th Dec. 1693, M. 13,071.

(*n*) D. of Hamilton, as above.

(*o*) Treas. of Edinburgh, 25th Feb. 1696, M. 4188.

(*p*) Munro, as above.

(*q*) Craig, 2. 3. 37.

(*r*) Erak. 2. 4. 5.

(*s*) Munro, as above.

(*t*) Blackbarony, 19th Nov. 1769, M. 10,272.

(*u*) 1633, c. 10.

(*v*) 1707, c. 11.

(*w*) 1690, c. 29.

(*x*) E. Aberdeen, 8th Feb. 1699, M. 7974.

(*y*) Nasmyth, 8th Nov. 1748, M. 10,276.

(*z*) 1597, c. 243; Stair, 2. 3. 35.

(*aa*) Stair, 2. 4. 27; Erak. 2. 5. 48.

(*bb*) Kincaid, 1st Dec. 1610, M. 13,579; E. of Dundonald, 24th Nov. 1736, mentioned in note to Kincaid.

(*cc*) Hamilton, 17th Jan. 1756, M. 15,109.

(*dd*) Erak. 2. 6. 63.

(*ee*) Mack. 2. 6. 12; Laurie *v.* Yuille, 24th Jan. 1823, F. C., 2 S. 155.

(*ff*) Wallace, 29th June 1739, M. 4195.

(*gg*) Rollo, 26th March 1629, M. 4185.

(*hh*) Rollo, as above; Moncrieff, 21st July 1630, M. 4185; Bishop of Galloway, 24th Feb. 1632, M. 4186.

(*ii*) 1469, c. 36; Ersk. 2. 8. 33; Rollo, as above; Biggar *v.* Scott, 13th July 1738, M. 4191; Cockburn, 30th Jan. 1639, M. 4187; Winerham, 19th July 1665, M. 4188; Hamilton, 22d Jan. 1712, M. 4189.

(*kk*) Bell's Com. 2. 413; Kirkland, 17th May 1831, F. C., 9 S. 596, affirmed, 25th March 1833; M. Abercorn, 16th Dec. 1835, F. C., 14 D. 168.

(*ll*) Napier, 31st May 1831, 9 S. 655.

(*mm*) See Nasmyth, 8th Nov. 1748, M. 10,276.

(*nn*) Mags. of Inverness, 25th July 1751, M. 15,059. Here the word *assignees*, in heirs and assignees, was held to imply assignees before infeftment, and not singular successors; Salmon, 25th July 1751, M. 4181; Brisbane, 6th June 1794, M. 15,061; Thomson, 22d May 1810, F. C.; Innes, 22d June 1822, S. D. Here the term *singular successors* being used, the clause was held binding on the superior.

(*oo*) F. 2. 38.

(*pp*) Craig, 3. 1. 9-11.

(*qq*) Stair, 2. 11. 6.

(*rr*) Hunter, 16th Dec. 1834. F. C., 13 S. 205.

57. CLAUSE OF WARRANDICE (*a*).—This clause becomes necessary where the parties stipulate for conditions which are not implied in alienations; but it is usually inserted, even when not essential, *ob majorem cautelam*.

1. *Implied warrandice.*—In sales for an adequate price, the warrandice implied in the nature of the agreement is absolute, and equivalent to express warrandice *against all deadly* (*b*). Where, again, the agreement is by way of transaction, and the disponee accepts of the right *talis qualis*, for a sum lower than its intrinsic value, Stair is of opinion that the warrandice implied in the conveyance is from the disponer's future voluntary deeds only, and his dictum is supported by a decision (*c*). Mr Erskine (*d*), on the other hand, states that the warrandice here is from past as well as future deeds. The granting of a charter by progress, (unless upon a charge,) and of any voluntary deed, infers warrandice from future inconsistent acts (*e*).

2. *Express warrandice.*—This sort of warrandice is either *personal* or *real*. Personal warrandice is *absolute, from fact and deed*, and *simple*. Real warrandice is *implied* or *express*.

3. *Absolute warrandice.*—(1.) This warrandice is in practice expressed in conveyances for an adequate price or other full onerous consideration, although a clause of absolute warrandice imports no more than does implied warrandice of

the same degree. As even this strongest kind is subject to a variety of exceptions, it follows that express words are requisite to exclude those exceptions. A clause of absolute warrandice, for example, does not protect against burdens which attach by law to the *dominium utile*, such as casualties of superiority (*f*), teinds and other public burdens: these must be expressly renounced or guarded against, when such is the agreement of parties, by words which admit of no dubiety. (2.) Warrandice against payment of teinds and stipends does not protect against future augmentations, unless that term be used, or words admitting of no other construction (*g*). In construing a clause of this nature, it is of importance to observe if the teinds do or do not belong to the disponee. If the former, then it will require very clear expressions to relieve him from future augmentations of stipend (*h*); but if the latter, warrandice simply against teinds and stipends seems necessarily to imply relief from present and future stipends. The reason is, that as the surplus teind over what is payable to the minister belongs to the titular, and warrandice against payment of teinds relieves the disponee of the burden of payment to the titular of whatever that surplus consists of at the date of the conveyance, the burden so taken from the disponee cannot be revived, in whole or in part, by the modification of a larger stipend to the minister, who in effect thus merely takes away another portion of teind from the titular (*i*). (3.) Tacks being protected against singular successors by statute, and the prevailing mode of deriving profit from heritage, have been adjudged not to fall under the ordinary clause of warrandice (*k*); but it has long been the practice to except tacks in express terms from its operation, and hence, to omit the exception might infer a presumption against the disponer. (4.) Losses or burdens originating after the date of the grant by fatality, or the operation of a supervenient statute, or even of a public law existing prior to the grant, are at the hazard of the disponee, unless guarded against by express words (*l*). The same observation applies to a servitude but slightly burdensome, such as pasturage, fuel, feal or divot, or a moderate thirlage to the mill of the barony within which the lands lie (*m*).

4. *Warrandice from fact and deed.*—(1.) This lesser kind of warrandice extends to the past as well as the future deeds of the granter, and even to his omissions (*n*). Excepting that the character in which the seller transacts is implied to be true (*o*), it is a bargain of hazard; and the conveyance is merely of what right the seller has, and is accepted upon all other risks but those arising from his act. Consequently, the eviction of the subject on grounds attributable to other causes gives no claim for repetition of the price (*p*). (2.) This kind is the proper warrandice in conveyances of debts, for of these absolute warrandice imports not that the debtor is solvent (*q*), but only *debitum subesse*, that the bond, or other obligation, is a valid deed, even although the clause should bear that the sum shall be *good, valid and effectual* (*r*). (3.) Warrandice from fact and deed is the proper obligation, likewise, by trustees, who at the same time bind their constituents in absolute warrandice, or assign to the disponee the obligation contained in the deed under which they act (*s*).

5. *Simple warrandice.*—This lowest description of personal warrandice is unknown in practice: it is equivalent to that implied in gratuitous deeds, and means that the granter shall do nothing in prejudice of the conveyance (*t*).

6. *Real warrandice.*—(1.) It is *implied* in excambions. Excambion, or the exchange of one heritable subject for another, is a contract which is voided by the eviction from either of the parties of the lands received in exchange, and the proprietor who suffers the eviction has recourse upon his own lands although in the possession of a singular successor (*u*). Care ought to be taken to express the nature of the transaction in the instrument of sasine following upon the excambion (*v*). (2). The *express* conveyance (*w*) of other lands, in warrandice of the subjects disponed, is of the nature of a proper real security. It extends not merely to so much of the warrandice lands as is equivalent to the value of the subject of the conveyance at the time of eviction, but covers also the rents since that period, and the whole loss and damage incurred by reason of the eviction (*x*). Real warrandice is thus a more perfect, but a less extensive security than absolute warrandice, since the former is necessarily limited by the

value of the warrandice lands; but although it is usual, in a conveyance which contains real warrandice, to give personal warrandice from fact and deed only, a disponee will naturally demand absolute warrandice where there is doubt of the sufficiency of the warrandice lands. In excambions, the security, although real, can be made available only by resolving the agreement. The party resumes possession of his own lands by means of an action of maills and duties, without regard to the extent of the loss, as the only mode of effecting his relief. But, under a conveyance in real warrandice, the damage must be liquidated, and it is recoverable as a real burden, by assuming possession of the warrandice lands, or by adjudication (*y*). A clause of sale might perhaps, with good effect, be added; but this sort of security is hardly known in practice. A burden thus constituted over lands conveyed in real warrandice is worked off by the operation of the positive prescription in fortifying the title to the principal subject (*z*).

Practical results.—The important rule to be observed in framing the clause of warrandice in the original charter, results from the doctrine, that express warrandice supersedes what is merely implied (*aa*). The safe course is thus to frame a clause adapted to the agreement of parties. When it is omitted, absolute warrandice is implied, according to Craig (*bb*), where the charter bears an onerous cause of granting, even *servitii præstatio*—the performance of services; but this view is controverted by Stair (*cc*), who is of opinion, that unless there has been an anterior consideration in money or value, the vassal, on eviction, being free of the duties and prestations, has a claim of damages only when the eviction arises from the future fact and deed of the superior. This may have been an equitable doctrine at the close of the 17th century; but, at the present day, when the feu-duty is adequate and not elusory, the warrandice implied in the nature of the contract would probably be held to be absolute, and not merely from fact and deed. Where warrandice is express, and of a subordinate kind, warrandice of a higher description against a particular deed is strictly interpreted (*dd*).

(*a*) "Which lands, teinds and others above disponed, with this feu (or blench) "right, and the infeftment to follow hereon, I bind and oblige me and my

" foresaids to WARRANT to the said B. and his foresaids, at all hands, and against " all mortals."

(*b*) Craig, 2. 4. 2; Stair, 1. 14. 7; 2. 3. 46, *in fine;* Ersk. 2. 3. 25.

(*c*) Stair, 2. 3. 46; Bothwell, 23d Dec. 1698, M. 16,613.

(*d*) Ersk. 2. 3. 25.

(*e*) Ersk. 2. 3. 27; Stair and Ersk. as in (*b*).

(*f*) Balfour, p. 318, c. 5; Drummond, 28th May 1549, M. 16,565.

(*g*) Cunninghame, 27th Jan. 1829, F. C., S. (*Teinds,*) 175. This case was well considered, and the opinion of the majority of the Court contains an analysis of the prior cases, both reported and unreported. The clause of warrandice (which was found effectual) is in these terms: " Therefore we, the said A. and " B., bind and oblige us, our heirs, executors and successors, to warrant the said " C. and D., and their foresaids, from all payment of any teinds or minister's " stipend furth of the said lands of E., in all time coming." The teinds were not conveyed to the disponees.—M'Ritchie's Trustees, 26th Feb. 1836, F. C., 14 D. 578. There the clause was thus expressed: " I bind and oblige me, " and my heirs and successors, not only to relieve the said B. and C., and their " foresaids, of the minister's stipend, and reparation of manses that may be " required furth of the said lands and teinds, in all time coming, but also to " warrant this my charter to be good and sufficient to the said B. and C., and " their foresaids, at all hands, and against all deadly, as law will." There was no stipend payable at the date of the charter, and the clause was therefore held applicable to future augmentations. See Roxburghe, 23d Jan. 1838, D.

(*h*) E. of Hopetoun, 8th Dec. 1819, F. C.

(*i*) Cunninghame, and M'Ritchie's Trustees, as above.

(*k*) 1449, c. 18; Simpson, 14th March 1563, M. 16,565; Lady Pitferren, 19th June 1629, M. 16,577.

(*l*) Stair, 2. 3. 46; Ersk. 2. 3. 29.

(*m*) Stair, last cit.; Ersk. 2. 3. 31; Sandilands, 21st June 1762, M. 16,599; Symington, 14th Jan. 1780, M. 16,637.

(*n*) Haliburton, 25th June 1669, M. 16,591.

(*o*) Lawson, 12th Dec. 1775, M. 16,636.

(*p*) Craig, Jan. 1732, M. 16,623.

(*q*) Hay, 16th June 1664, M. 16,586.

(*r*) Stair, 2. 3. 46; Ersk. 2. 3. 27.

(*s*) See Forbes's Trustees, 15th June 1822, 1 S. 497. The following clause may perhaps be adopted with advantage: " Which lands, teinds and " others above disponed, with this conveyance of the same, and infeftment to " follow hereon, we, the said A., B. and C., not only bind and oblige our con- " stituent, the said D., to warrant to the said E. and his foresaids, at all hands, " and against all mortals, and us, the said A., B. and C., to warrant against our " own proper facts and deeds only; but we also hereby assign, convey and make " over, to and in favour of the said E., the clause of absolute warrandice con- " tained in the said trust-deed above specified, whole tenor and effect thereof," &c.

(*t*) Ersk. 2. 3. 25.

(*u*) Ersk. 2. 3. 28; Wardhouse, 14th July 1629, M. 16,578.

(*v*) See Balfour, 14th Jan. 1788, M. 16,638.

(*w*) I, A., SELL, ALIENATE and DISPONE, &c. ALL and WHOLE (*describe*

principal lands,) as for principal; and also, ALL and WHOLE *(narrate warrandice lands,)* and that in special and real warrandice and security of the said lands of *(principal lands,)* and pertinents thereof above disponed: So THAT, if the said lands of *(principal lands,)* and the pertinents, or any part thereof, shall happen to be evicted from the said B., or his foresaids, THEN and in that case they shall have free and immediate access, ingress and recourse to the said lands of *(warrandice lands,)* and to the rents, maills, duties and casualties of the same, at least to so much thereof as shall correspond to the lands so to be evicted, from thenceforth to be peaceably enjoyed and possessed, &c. (as in Jur. Styles, 1. 150.)

(*x*) Ersk. 2. 3. 30; Blair, 6th Nov. 1741, M. 16,624.

(*y*) Jur. Styles, 1. 150. See Bell, Com. 1. 694.

(*z*) Trust. of Durham, 9th July 1800, M. 16,641.

(*aa*) Stair, 2. 3. 46; Ersk. 2. 3. 27; Glendinning, 6th Jan. 1710, M. 16,616.

(*bb*) Craig, 2. 4. 2.

(*cc*) Stair, last cit.

(*dd*) Ogilvy, 2d Feb. 1715, M. 4154.

58. ASSIGNATION TO WRITS AND RENTS (*a*).—1. *Writs.*—This clause, in so far as it relates to the writs or title-deeds of the subjects, extends only to an obligation on the superior to make them furthcoming for defending the right of the vassal, and that on all necessary occasions. This subject is noticed under the disposition of sale.

2. *Rents.*—The assignation to the rents or maills and duties payable by the tenants and occupiers of the lands, may happen to be of advantage to the vassal, if he should delay to take infeftment on the charter: intimation of the assignation will in these circumstances exclude the future diligence of arrestment for the debts of the superior, or the effect of a prior or subsequent assignation, intimated after the assignation contained in the charter. After infeftment the vassal's right to the lands, and consequently to the rents, is real, and cannot be affected by the diligence of the superior's creditors. But it is thought that too much weight is ascribed to this infeftment, by a high authority in feudal conveyancing (*b*), when he states, that if the purchaser has gone on to complete his title by sasine, he will be preferred to an arresting creditor, although the arrestment be of a prior date to the sasine. Such would be the effect were the rents arrested only current, and not payable till after the registration of the purchaser's sasine (*c*); but there seems to be no authority for holding that a vassal

or purchaser, by taking and completing an infeftment before the rents arrested have been made furthcoming, may compete with the arrester, provided they were payable prior to the using of the arrestment. The other cases relied on by that learned author appear to shew merely that infeftment is equivalent to an intimation of the assignation to the rents, and as such excludes future arrestments (*d*).

(*a*) "AND FURTHER I hereby make and constitute the said B. and his foresaids my cessioners and assignees, in and to the whole writs and evidents rights titles "and securities of the said lands and others granted in favour of me my authors "and predecessors and that to the effect of maintaining and defending the said "B. and his foresaids in the right of the said lands and others and as the "same cannot be herewith delivered up I oblige myself and my foresaids to "make the same forthcoming to the said B. and his foresaids whenever they "have occasion for the same and that upon a proper receipt and obligation for "re-delivery within a reasonable time: As ALSO I hereby assign transfer and "make over to the said B. and his foresaids the rents maills and duties of the "said lands and others from and after the term of Martinmas (or Whitsunday) "next which is hereby declared to be the term of his entry," &c.

(*b*) Bell, Conv. of Land.

(*c*) Hautlie, 13th Dec. 1628, M. 2764.

(*d*) Erskine, 2d Nov. 1748, M. 2901; Webster, 13th July 1780, M. 2902.

59. WARRANDICE OF THE ASSIGNATION (*a*).—This clause would appear to have no effect, beyond confirming the obligation of warrandice implied in the nature of the transaction. A party bound in warrandice, by assigning the title-deeds to the purchaser or vassal, in so far protects the subjects against eviction, and himself from claims consequent upon eviction; but he gives no new or separate right which must necessarily have separate warrandice. Warrandice, again, of the rents from fact and deed, is the precise obligation which the law imposes on the seller or superior without express paction. The subject conveyed, and consequently its yearly fruits, belong to the purchaser from the term of his entry; and as the price is calculated to the same term, the seller's connection with the subject as a source of revenue is then at an end. The rents are thenceforth payable to the purchaser, either under the assignation in the conveyance, or in virtue of his infeftment; and as the seller is not bound, unless by special agreement, to warrant the rental or the solvency of tenants, it follows that his obligation of warrandice can extend no far-

ther than to cover rents received by him or his factors, after the term of entry, or, in other words, to fact and deed.

(*a*) "WHICH ASSIGNATION I bind and oblige myself and my foresaids to "warrant as follows, viz. in so far as concerns the writs and evidents at all hands "and against all mortals; and in so far as concerns the rents mails and duties "from my own facts and deeds only." *Note.*—It is advisable, as a general rule, to ascertain the extent of the superior's liability under this clause by means of an inventory.

60. OBLIGATION IN REGARD TO PUBLIC BURDENS (*a*).—(1.) This clause binds the superior to free the lands of all cess, minister's stipend, and other burdens due prior to the period of the vassal's entry. The general term, *public and parochial burdens*, includes poor's rates, repairs of manses and schoolhouses, and schoolmaster's salary, as well as cess or land-tax; but not stipend or teind-duty, which is a burden inherent in the right of property, and not imposed by any particular statute (*b*). Statute labour has been held as personal to the actual possessor of the lands; but the circumstances of the case were in some respects special (*c*). As burdens properly public affect the lands and their rents, they are payable by the person who is actual proprietor of the *dominium utile* at the time they become due. For example, if the vassal's entry be at Whitsunday, he is liable in payment of the cess or land-tax for the year which commenced on the 25th of March preceding that term, as being current at the time of his entry. It is thus necessary to insert an express clause of relief in the charter, where the intention is that the superior shall continue liable in whole or in part for future burdens, beyond the proportion effeiring to the amount of feu-duty; and as a general clause of relief may, in certain circumstances, be interpreted according to the practice of the estate or the district (*d*), it is advisable to express those particular burdens, of which it is agreed that the vassal shall be relieved. It has been explained, that warrandice against payment of stipend does not necessarily include augmentations; (§ 57, 3.) (2.) The vassal is usually taken bound to relieve the superior of public burdens falling due subsequent to the period of his entry. When this obligation is omitted, the superior seems to be liable in a

share of these burdens, in the proportion which the feu-duty bears to the rents of the lands (*e*).

(*a*) "AND FURTHER I hereby bind and oblige me and my foresaids to free "and relieve the said B. and his foresaids of all cess minister's stipend and "other public and parochial burdens exigible furth of the said lands and others "preceding the said term of Martinmas (or Whitsunday) the said B. and his "foresaids being bound to free and relieve me and my foresaids of the same "in all time thereafter."

(*b*) See M'Ritchie's Trustees, 26th Feb. 1836, F. C., 14 D. 578.

(*c*) Johnston, 13th June 1800, M. App. *Public Burdens*, 1.

(*d*) Bruce Carstairs, 23d Jan. 1773, M. 2333; B. S. 5. 561; Hailes, 524; affirmed on appeal.

(*e*) Feuars of Kinross, 7th Feb. 1693, M. 13,071; Treas. of Edinburgh, 25th Feb. 1696, M. 4188.

61. CLAUSE OF REGISTRATION (*a*).—Charters by subject superiors may bear a clause for registration, but in the books of Council and Session only (*b*). This form was introduced "for the greater security of purchasers and others;" but registration is not made imperative, and the books of Court are at any rate not a register of real rights.

(*a*) "And I CONSENT to the registration hereof in the books of Council and "Session, therein to remain for preservation, and for that purpose constitute "my procurators," &c.

(*b*) 1693, c. 35. (*Excerpt.*) "And it is further hereby declared, for the "greater security of purchasers and others, that charters granted by subaltern "superiors may bear a clause of registration as well as dispositions, and that on "the said clauses, registration may follow, but only in the books of Council and "Session, and in no other record."

62. PRECEPT OF SASINE (*a*).—1. This clause is of comparatively modern introduction. When superiors came to invest their vassals by the interposition of a bailie, in place of publicly in presence of the *pares curiæ*, their mandate or precept was executed by the delivery of possession by the bailie, who added at the end of the precept a memorandum of the fact under his seal (*b*). Bailies were chosen, it is probable, from among the clerical notaries, who, at an early period, practised in Scotland, and were the only persons acquainted with writing. In order to assimilate the writ that evidenced the transference of possession, to the *notitiæ* of the continental nations which were made out apart from the

literæ or *chartæ*, they seem to have gradually introduced the practice of framing a certificate of the fact in the form of a separate instrument of sasine or delivery. This instrument appears to have existed before the period of the return of James I. from England (*c*). Precepts of sasine continued to be engrossed in a separate form till the end of the 17th century. By a statute passed in 1672 (*d*), it was enacted, that all precepts on Crown charters should be engrossed towards the end of the charter, and practice soon extended this convenient alteration to charters by subject-superiors.

2. *Precepts subsist until validly executed.*—(1.) These clauses, as mandates, of old expired on the death either of the superior or vassal, although procuratories *in rem suam* granted wholly for behoof of the latter. For remedy of the inconvenience thus experienced, it was enacted (*e*), that precepts of sasine then existing, or to be in future granted, should in all time coming continue in full force, and be sufficient warrants, not only in favour of the parties, but likewise of their heirs, assignees and successors, having right to them by a general service, disposition and assignation or adjudication, as well after as before the death of the granters, or parties to whom they are granted, or both; providing always, that the instruments of sasine taken after the death of either party express the titles of those to whom the sasine is granted, " and " that the same be deduced therein, otherwise to be void and " null." From this enactment are excepted precepts of *clare constat*, which, as being granted to heirs as such, are strictly personal. (2.) The precept of sasine is not exhausted by infeftment, unless the instrument following on it be formal and valid, and duly registered. See *Registration of Sasine*.

3. *Form of the precept.*—(1). This important clause is in the form of a command by the superior to his bailie to give infeftment to the vassal of the subjects contained in the dispositive clause of the charter, by the delivery of certain symbols of possession. It is thus the executive clause of the charter; and although it may authorise infeftment in a more limited right than that conveyed (*f*), it cannot go beyond the dispositive clause. The name of the bailie being blank, the holder for the time of the charter is in our later practice pre-

sumed to be the representative of the superior; but of old a commission of attorney from the Queen's Chancery was requisite to confer that character (*g*). The precept must, however, contain an express mandate to infeft the vassal by name (*h*). The person who produces the warrant to the bailie is presumed, from his possession of it, to be authorised by the vassal to receive infeftment for him, and is called his procurator or attorney; but this presumption is not absolute. It may be excluded by contrary evidence (*i*) in cases where sasine would be prejudicial, *e. g.* where the vassal's heir, by infeftment on a precept of *clare constat*, would be subjected in his ancestor's debts. (2.) Precepts issuing from Chancery for the infeftment of heirs in lands holding of the Crown and Prince, form the only exceptions to the ordinary style of the precept of sasine. These are addressed to the Sheriff of the shire in which the lands are situated, as the Sovereign's bailie, for the reason that he is intrusted with the duty of taking security from the heirs for the amount of the casualties of non-entry and relief, payable by them on the renewal of the investiture (*k*). See *Entry of Heirs*. Precepts of sasine in Crown charters are in a similar form; but after the address to the Sheriff are added these words, "*dilectis nostris* "*et vestrum cuilibet conjunctim et divisim vicecomitibus nostris* "*in hac parte specialiter constitut.*," which have the same effect with the blank address in the ordinary form of the precept, and authorise the actual holder of the deed, as *Sheriff in that part*, to infeft the vassal.

4. *Effect of the precept as qualifying the conveyance.*— The precept of sasine being the only clause which is transferred as a quotation from the charter to the instrument of sasine (*l*), a rule which inveterate practice has sanctioned, it thus becomes of equal importance to the superior as any other, even the dispositive clause, although apparently of use only for completing the title of the vassal; for, by the present practice, it is unfortunately not imperative that this latter shall be transferred entire to the sasine. The vassal will of course take care to express in that instrument the lands and subjects conveyed to him; but it is plainly for the interest of a superior granting an original charter, or any other disponer, to repeat in the

precept of sasine the whole burdens and reservations with which it is the agreement of parties that the fee shall be affected. It is recommended in the Jur. Styles (*m*), to insert these in the precept, and merely refer to them in the other clauses of the deed, as contained in it; but even assuming that a mere reference in the dispositive clause to the limitations expressed in the precept of sasine would effectually burden the conveyance, there is still no security that the reference there made would be transferred to the instrument of sasine. It is true, that an irritant and resolutive declaration is considered in practice to be effectual for securing the insertion in the instrument of clauses which it is the interest of the superior to have transferred to the register; but it is manifest that the same difficulty applies to such a declaration, for unless it is continued in the chain of infeftments, it will not be binding on a singular successor. The proper remedy is by statute. The description of the lands need not be repeated in the precept of sasine: it is enough to refer to the different parcels by their leading names, as contained in the dispositive clause, and to hold them as repeated, *brevitatis causa*.

5. *Symbols of possession.*—The symbolical delivery of lands is not a native ceremony; it was introduced with our forms of deeds. This ceremony prevailed in the middle ages in France, Germany and Italy, as is shewn by the Styles of those countries (*n*). In the Forms of Marculfus, we find, that among the Franks the ordinary symbols for lands were *herba et terra*, or *herba et cespes;* of houses, *ostium et anaticula;* of a vineyard, *terra et vinea*. The variety in the kinds of symbols was great. In the *Formulæ in usum regni Italici*, in Canciani's Compilation (*o*), mention is made of the various symbols, such as a knife, a knotted stick, the branch of a tree, an inkstand, &c., employed by individuals belonging to the different nations composing the Lower Empire,—Romans, Franks, Goths, Germans,—who were in a certain degree governed by their own laws. These symbols represented the subject transferred where corporal delivery was impracticable; while, in the tradition of houses, the seller walked out at the door, and left the premises unoccupied to the buyer, who entered and took actual possession of the subject. In either case, the will of

the disponer to divest himself of the property was evidenced by the delivery to the disponee, or his representative, of a rod or baton as the symbol of ownership. The symbols now in use in Scotland are,—for lands and houses, *earth and stone;* for mills, when conveyed as separate tenements, *clap and happer;* for teinds, a *handful of grass and corn;* for patronages, a *psalm book and the keys of the church;* for the investiture of an heir in houses held by the tenure of burgage, *hasp and staple;* for annualrents, a *piece of money*, and if prestable in victual, *a handful of corn;* for salmon-fishings, *net and coble;* for jurisdictions, the *book of the Court;* and for a right of ferry, *an oar and some water.* In practice, it is usual and safe to add, after the enumeration of the particular symbols applicable to the subjects conveyed, "and all other symbols "usual and requisite."

(*a*) *Moreover* I hereby desire and require you

and each of you my bailies in that part hereby specially constituted That on sight hereof ye pass to the ground of the said lands and others and there give and deliver to the said B. or his foresaids heritable state and sasine with real actual and corporal possession of all and whole the lands teinds and others particularly above specified with the pertinents lying and described as aforesaid and here held as repeated *brevitatis causa* to be holden in manner foresaid and for payment of the feu (or blench) duties before specified and that by delivering to the said B. or his foresaids or to his or their attorney in his or their names bearers hereof of earth and stone of the ground of the said lands and a handful of grass and corn for the said teinds with all other symbols usual and necessary and this in no ways ye leave undone WHICH TO DO I commit to you and each of you my full power by this my precept of sasine directed to you for that effect.

(*b*) Craig, 2. 7. 2.

(*c*) Erskine, App. 4.

(*d*) 1672, c. 7.

(*e*) 1693, c. 35. Our Sovereign Lord and Lady the King and Queen's Majesties CONSIDERING that procuratories of resignation and precepts of seasin do become void by the death of the granters, als well as of the parties in whose favours they are granted, albeit they be granted *in rem suam*, and wholly in favours of the receiver, and that thereby a great and unnecessary expense is occasioned for obtaining these procuratories and precepts renewed. THEREFORE their Majesties with advice and consent of the Estates of Parliament DO STATUTE ORDAIN and DECLARE that procuratories of resignation and precepts of sasine either already granted or to be granted shall in all time coming continue in full force and be sufficient warrands not only for making of resignations and taking seasins in favours of the parties to whom they are or shall be granted but likewise in favours of their heirs assignees and successors having right to the said

procuratories and precepts either by a general service or by disposition and assignation or by adjudication, as well after as before the death of the granters or parties to whom they are granted or both PROVIDING always that the instruments of resignation and seasins taken after the death of either party express the titles of those in whose favours the resignation is made or to whom the seasin is granted, and that the same be deduced therein otherwise to be void and null EXCEPTING always from this act precepts of *clare constat*. And it is further hereby declared for the greater security of purchasers and others that charters granted by subaltern superiors, may bear a clause of registration als well as dispositions and that on the said clauses registration may follow but only in the books of Council and Session and in no other record.

(*f*) Graham's Children, 4th July 1759, M. 6931.

(*g*) Balfour, *v. Order of Chancellarie*, c. 18.

(*h*) Blackwood, 7th Nov. 1740, M. 14,327; Melville, 14th Feb. 1794, M. 14,327.

(*i*) Craig, 2. 7. 6; Stair, 2. 3. 17.

(*k*) 1540, c. 77; 1555, c. 34; 1606, c. 15.

(*l*) Stair, last cit.

(*m*) Jur. Styles, 1. 23.

(*n*) Leg. Barbar. 2. 256.

(*o*) Same, 2. 474, and foll.

63. CHARTERS FROM THE CROWN.—The form of the original charter, which has thus to some extent been explained, does not differ in any essential particular from a Crown grant, a writ which is almost unknown in practice, the whole landed property of the kingdom, with exceptions of a very limited extent, being in the hands of subjects. The clause of union, and the clause of erection of a barony, which are the only parts in which Crown charters materially differ from those granted by subject-superiors, are noticed below.

TITLE III. INSTRUMENT OF SASINE.

64. ORIGIN AND PURPOSE.—The writ by which the feudal investiture is completed in the person of the vassal is called the *instrument of sasine*. (1.) The mode of investing a vassal or disponee, in the earlier period of our feudal history, is explained at § 28. It thence appears that the delivery of possession, which was given in presence of the *pares curtis* or *curiæ*, and evidenced by the *breve testatum*, was the essence of the ceremony. Military services having been at that period presumed, and due equally by every vassal unless where modified by custom, a separate deed was unnecessary. It was therefore for the purpose of expressing the terms of the grant, and the situation

of the subjects, and not to add to the evidence of possession, that the charter came into use. We perceive that it did not supersede the symbolical delivery of the lands, which was still given by the superior's bailie, and attested by his seal appended to the precept of sasine or infeftment, (§ 62.); a form which was common not long prior to Craig's time, although he states that our modern instrument of sasine was introduced about the year 1430, in the reign of James I. *Occasio sasinæ introducendæ*, (says Craig,) (*a*), *nata est ex ambiguitate et fraudibus quæ in traditione possessionum occurrebant; cum aliqui dominium ubicunque esset per baculi aut fustis traditionem, alii ex clavium traditione possessionem dare putabant; alii in curia tantum, alii extra curiam coram paribus. Itaque ut nullus dubitationis locus relinqueretur, et male feriatorum hominum calumniis obviam irent, majores nostri realem et actualem inductionem in ipsum fundum, ac super ipso fundo, voluerunt esse, et vera possessio videatur.* The bailie's certificate thus gradually gave place to an instrument upon the fact by a public notary, called an *instrument of sasine*, a writ which has become an indispensable part of the feudal investiture. It has superseded the necessity of actual possession, and is taken as full evidence of civil possession, not to be supplied by the most pregnant proof of the delivery of actual possession by the superior or his bailie (*b*); and the maxim, *nulla sasina, nulla terra*, may be considered as universally applicable, except perhaps to the single case of the erection of a burgh (*c*). (2.) It is now an established rule that no real right or burden can be created over heritage, unless by means of a duly registered instrument of sasine. Before infeftment, the right acquired by the vassal is personal only, or *jus ad rem*—a right to the subject, sasine being essential to convert it into *jus in re*—a right in the subject. (3.) The same rule applies to reservations by the superior in his own favour, or renunciations by him in favour of the vassal, which, as limitations of the vassal's natural rights on the one hand, and on the other of those of the superior, must, to be valid against singular successors in the superiority or property respectively, be inserted in the instrument of sasine (*d*). (4.) Sasine *propriis manibus* is a remnant of the ancient feudal investiture, and although now

only employed in giving liferent infeftment by a husband to his wife, furnishes the strongest illustration of the doctrine, that the delivery of possession was the essence of the feudal grant. It is sustained in questions with the granter's heir, without a prior conveyance, the instrument bearing the subscription of the husband, and without the necessity of a testing clause (*e*).

(*a*) Craig, 2. 2. 18, and 2. 7. 2.
(*b*) Ersk. 2. 3. 34.
(*c*) M. of Tweeddale, 3d July 1740, M. 6896. See Aytoun, 4th June 1833, F. C., 11 S. 676.
(*d*) Ersk. 2. 3. 48.
(*e*) Kibble, 4th Dec. 1804, M. 14,314.

65. CEREMONY OF INFEFTMENT.—The form of infefting a vassal or disponee is as follows: The vassal or his attorney appears on the ground of the lands or other subject of the conveyance, with the superior or his bailie, and attended by a notary and two witnesses. The vassal or his attorney begins the ceremony by delivering the warrant to the bailie, who again gives it to the notary, and the latter thereupon explains the nature of the conveyance to the witnesses, and reads the precept of sasine. The notary then redelivers the charter to the bailie, and he, holding it in his hands as the warrant for infeftment, gives the proper symbols of possession to the vassal's attorney, who puts a piece of money, usually of silver, into the notary's hand, saying, "I take instruments in your hands be- "fore these witnesses." A note of the hour, and of the names and designations of the bailie, attorney and witnesses ought to be taken down by the notary at the time, that nothing may depend upon his memory alone.

66. CLAUSES OF THE INSTRUMENT.—The ceremony of infeftment is expressed in the instrument of sasine (*a*), which contains the following clauses: 1. *The invocation;* 2. *The date;* 3. *The appearance of the parties and the notary and witnesses on the ground;* 4. *The narrative of the charter;* 5. *The vassal's requisition to the bailie;* 6. *The bailie's acceptance of the warrant, and delivery of it to the notary;* 7. *The publication of the charter;* 8. *The delivery of sasine;* 9. *The*

taking of instruments; 10. *The summary of the res gestæ and description of the witnesses;* 11. *The notary's doquet.*

(*a*) Jurid. Styles, 1. 67.

67. THE INVOCATION (*a*).—The introductory clause of the instrument of sasine is called the invocation. This part of the writ is derived from the practice of the Romans in their solemn acts (*b*).

(*a*) In the Name of God, Amen.
(*b*) Craig, 2. 7. 11.

68. THE DATE (*a*).—(1.) This clause is likewise borrowed from the Romans of the latter ages of the Empire, who prefixed to their instruments the year of the Emperor's reign, the name of the consul of the year, the indiction, and the month and day of the month (*b*); but in our earliest sasines it was usual to insert the year of our Lord, the indiction and the year of the Pontificate, without mention of the year of the Sovereign's reign (*c*). (2.) The date, properly so called, is necessary for fixing the time within which the instrument must be registered, and is to be considered among its essentials (*d*); but the date, as inserted in its proper place in the instrument, is not falsified by an erroneous reference to it in a subsequent clause (*e*). (3.) The year of the reign serves to test the correctness of the date, and thus a discrepancy between the two might be fatal.

(*a*) KNOW ALL MEN by this present public instrument, That upon the day of in the year of our Lord, and of the reign of her Majesty, Victoria the First, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, the first year.
(*b*) Nov. 47. Pr. et c. 1. § 1.
(*c*) Ersk. App. 4.
(*d*) Stair, 2. 3. 18; M'Queen, 23d Jan. 1824, F. C., 2 S. 637; Hoggan *v.* Smith, 13th Feb. 1835, F. C., 13 S. 461.
(*e*) Gordon, 20th July 1773, B. S. 5. 587.

69. APPEARANCE ON THE GROUND (*a*).—In the third clause are recorded the names and designations of the procurator or attorney for the vassal, and of the superior's bailie, and their appearance on the ground of the lands. Much care is required

in describing them. It is true that there are no proper *verba solennia* in the style of the instrument, and that the Court have disregarded objections which do not affect the identity of the bailie or attorney (*b*); but an error in a name or designation may subject the deed to the uncertain result of a judicial inquiry.

(*a*) IN PRESENCE of me notary-public, and of the witnesses herein after named and designed, and hereto with me subscribing, and upon the ground of the lands and others after described, (respectively and successively, if legally discontiguous,) COMPEARED personally D., as procurator and attorney for B., whose power of attorney was sufficiently known to me notary-public: AS ALSO COMPEARED C., bailie in that part, specially constituted, by virtue of the precept of sasine herein after transcribed, contained in the feu (or blench) charter after narrated.

(*b*) Morton, 10th Dec. 1828, F. C., 7 S. 122; affirmed 4 W. S. 379. The Christian name of the bailie was omitted; a proof was allowed, and his identity established.

70. NARRATIVE OF THE WARRANT (*a*).—(1.) The fourth clause of the instrument narrates the warrant on which the ceremony proceeds; and if sasine is given to an heir or assignee, the retour or assignation likewise must be described, or, as it is expressed in the statute (*b*), the title deduced in the instrument. (2.) It is necessary that writs which the attorney produces should be so described as to admit of complete identification, which is best secured by specifying their dates, and the names and designations of the granters and disponees. An error or omission in the description of the warrant, although not necessarily fatal when other parts of the narrative supply what is wanting (*c*), may give rise to questions which the conveyancer ought carefully to avoid by exactness of description. (3.) The dispositive clause ought to be transferred entire to the instrument of sasine. (4.) A warrant subscribed by a person designed as commissioner for the granter is sufficient to authorise infeftment, although liable to objection at the instance of any party having interest, and it is not necessary that the commission should be narrated in the instrument (*d*).

(*a*) The said D. HAVING and HOLDING in his hands the said feu (or blench) charter, of the date under written, made and granted by A., heritable proprietor of the lands and others after described, to and in favour of the said B., whereby

the said A., for the causes therein specified, SOLD, ALIENATED, and in feu (or blench) farm DISPONED from him, his heirs and successors, to and in favour of the said B., his heirs and assignees whomsoever, heritably and irredeemably, ALL AND WHOLE (*the lands, with restrictions, &c. as in the dispositive clause of the charter*): To be holden of and under the said A., and his foresaids, in feu (or blench) farm, fee and heritage for ever, for payment of the feu (or blench) duty, and other prestations specified in the said charter; as the same, containing clause of absolute warrandice, the precept of sasine herein after transcribed, and other usual clauses, more fully bears.

(*b*) 1693, c. 35, above, page 100.

(*c*) Hamilton, 24th Jan. 1824, F. C., 2 S. 640; Gordon, 9th March 1827, F. C., 5 S. 550.

(*d*) Proctor, 14th May 1796, M. 8871.

71. REQUISITION TO THE BAILIE (*a*).—The instrument proceeds to describe the exhibition and production to the bailie of the warrant of infeftment, and the requisition of the vassal or his attorney that he should proceed to execute the office committed to him.

(*a*) WHICH FEU (OR BLENCH) CHARTER, the said D., as procurator and attorney foresaid, exhibited and produced to the said bailie, desiring and requiring him to proceed to the execution of the office of bailiary thereby committed to him.

72. DELIVERY TO THE NOTARY FOR PUBLICATION (*a*).—The next clause narrates the receiving of the warrant by the bailie, and the delivery of it by the bailie to the notary for publication to the witnesses.

(*a*) WHICH DESIRE the said bailie finding to be reasonable, he received the said feu (or blench) charter into his hands, and delivered the same to me, notary-public, subscribing, to be read and published to the witnesses present.

73. PUBLICATION OF THE CHARTER (*a*).—(1.) In this clause is described the publication or explanation of the terms of the charter by the notary to the witnesses, and in it are inserted the precept of sasine, the testing clause and subscriptions. The insertion, therefore, of the testing clause in the conveyance itself prior to infeftment passing upon it, is a practical rule which ought to be carefully followed; for although the Court are reluctant to allow inquiry into the time at which a testing clause had been filled up where falsehood is not proponed (*b*), a proceeding of so solemn a nature as infeftment ought not to be hazarded upon an incomplete writ. It is plain that any discrepancy between the terms of the clause,

as occurring in the sasine, and inserted in the conveyance, would destroy the presumption which usually obtains, that the testing clause had been filled up at the time of subscribing. It is not, however, a solemnity that the precept shall be transcribed *verbatim* into the instrument: it is sufficient that so much of it be introduced as relates to the subjects in which infeftment is given (*c*). The authority of an old case (*d*), where the Court sustained an instrument of sasine in which the precept was not inserted, but related only, has been rejected in practice, which, in such circumstances, is the best rule for the conveyancer. (2.) In a case where the infeftment was to an assignee, it was held that the statement in the instrument of the assignation having been exhibited by the attorney was sufficient, without any mention of its publication (*e*). The propriety of this decision has been doubted (*f*) on grounds which appear deserving of consideration; for as the publication of the charter and reading of the precept of sasine shew that the warrant is in favour of the cedent, it seems to be necessary that the deed which transfers that warrant to the assignee should be published to the witnesses, in order to account for the delivery of sasine to him or his attorney.

(*a*) WHICH I DID, and of which precept of sasine the tenor follows in these words: *(Precept of sasine inserted verbatim, also the testing clause, and the subscriptions of the granter of the charter and the witnesses to his subscription, precisely as appearing on the deed.)*

(*b*) Leith Bank, (or British Linen Company,) 22d Jan. 1836, F. C., 14 D. 332.

(*c*) Don, 4th Feb. 1813, F. C.

(*d*) Lamertoun, 23d Dec. 1680, M. 14,309.

(*e*) Scott, 17th Jan. 1781, M. 8838.

(*f*) Bell's Convey. of Land, 203-4.

74. DELIVERY OF SASINE (*a*).—1. *General purport.*—The eighth clause of the instrument records the giving of *state* and *sasine*, or symbolical possession, to the vassal or disponee. Before the introduction of the registers, this ceremony was of much importance, as making known the transference of fixed property to the neighbouring vassals and inhabitants. The investiture of a disponee was therefore performed in an

imposing manner upon the ground of the lands. The form is still observed with more or less strictness; but being now useless as a means of advertising the public of the change of possession, we find in the books but few cases relating to the mode of performing the ceremony of infeftment, although it is not to be doubted that the neglect of any substantial part of that ceremony, such as the going to the ground of the subjects with the bailie, attorney and witnesses named in the instrument, producing the warrant for infeftment, or delivering the leading symbols of earth and stone, would, if established by competent evidence, infer the falsehood of the instrument. It is the terms of this clause which are now chiefly of importance, and they may, in a practical sense, be considered to furnish an absolute presumption of the truth of the facts set forth in it. The essentials of the clause are:

2. *Delivery of state and sasine, real, actual and corporal possession.*—(1.) These, or equivalent terms not admitting of a contrary interpretation, are essential to the validity of the instrument (*b*). (2.) But as there are no particular *verba solennia* required by law, the Court have repeatedly disregarded objections founded on the omission of terms relating not to the substance, but the mere ceremony. Thus, an objection to a right of annualrent, that the symbols of *earth and stone* were expressed in the instrument, in place of a *penny money* which is the ordinary and proper symbol, was repelled (*c*). In other instances, the mention of the symbols of a particular subject has been entirely dispensed with, where infeftment truly appeared to have been given. Thus, sasine of lands and mills was sustained, the instrument bearing, *per terræ et lapidis traditionem fundi hujusmodi terrarum et molendinorum cum omni juris solemnitate* (*d.*) A similar general clause, *according to the solemnities used in such cases*, has, in other instances, been sustained (*e*); and in like manner, clauses bearing that the bailie gave *state and sasine upon the ground of the said lands and others* (*f*), *heritable state and sasine, conform to the precept, by delivery of the ground of the lands* (*g*), and even *real, actual and corporal possession* (*h*), have been held sufficient without mention of symbols. It is almost superfluous to observe, that the occurrence of such

cases, all, it is to be noticed, of old dates, is proof of very slovenly practice, and that they ought to be known to the conveyancer in order to be shunned, in place of being followed as precedents.

3. *Conformity with the precept.* — (1.) This clause must be in accordance with the precept of sasine, and consequently with the dispositive clause of the charter to which the precept has reference. Thus, it is incompetent to supply the names of disponees not expressed in the conveyance— such as *representatives* (*i*), *or heirs and assignees* (*k*). (2.) But to the rule which requires strict conformity with the warrant, an exception is admitted where lands have been conveyed as a barony or part of a barony (*l*), or even by such terms as *all lands, &c. pertaining to the granter, wherever the same lie in this kingdom* (*m*). In the one case, infeftment in each particular subject may be given on the evidence of former investitures, and in the other, on production of the granter's sasine. Where, however, the conveyance is not of all lands belonging to the granter, but partial, and the terms are ambiguous, the Court have pointed at a decree of declarator as the proper evidence to be laid before the notary (*n*). (3.) It is unnecessary to repeat the description of the lands, which, indeed, is not usually contained in the precept. What is essential is to refer to the several parcels separately, but shortly, and to hold them as inserted, *brevitatis causa*. The omission of such reference, with respect to any of the parcels, will exclude them from the investiture (*o*). (4.) Where the precept differs from the dispositive clause, the former, as the immediate warrant of infeftment, is necessarily the rule. Thus, when the right conveyed is one of fee, but infeftment is warranted in liferent only, infeftment in terms of the precept carries a mere right of liferent (*p*). (5.) Sasine may be in disconformity to the warrant in expression, and yet correct in substance; for as the greater includes the less, a precept may be validly executed as to part of the subjects contained in the charter, and infeftment on a precept warranting sasine in fee and liferent may be executed as to the liferent only (*q*). There is authority, likewise, for holding that a precept for infeftment in fee will authorise sasine in trust, if assigned under

the burdens and conditions of a trust (*r*); a doctrine which is by the same learned author extended to infeftment in any lesser right represented by the same symbols. But a precept for infeftment *in trust*, *in liferent*, or *in security*, will not authorise sasine in fee, although a precept in trust may be assigned so as to warrant sasine in fee; at least it may be so assigned, if conceived in favour of assignees (*s*) free of the provisions and conditions of the trust. Nor does a precept in fee authorise infeftment in an annualrent (*t*), a rule which is not contradicted by the competency of executing a precept in fee in virtue of the judicial conveyance of adjudication; for adjudication, although a redeemable right, is capable of being made absolute, which does not hold in regard to securities by bond.

4. *By whom and to whom given.*—(1.) It is essential to state, that sasine has been delivered by one person as for the superior, to another as for the vassal (*u*); and where this is substantially done, a blunder in expression, such as the transposition of the names of the bailie and attorney (*v*); the delivery of state and sasine to the attorney in place of the party (*w*), the omission of one of two parties for whom the attorney truly appeared, as stated in a preceding clause (*x*); or a mistake in repeating the name of the attorney (*y*), have been adjudged not to be fatal. These cases are obviously, however, to be shunned as rules of practice. (2.) Terms used in reference to the subjects conveyed, such as materially to limit the right, will, although manifestly erroneous, be read as they stand. Thus, the words, *in dimidietate tertiæ partis*, in place of *trium partium*, were interpreted to mean the half of a third, and not the half of three parts (*x*). (3.) As infeftment can, from its nature, be given to those only who have an immediate or *de præsenti* right, sasine in favour of a party named, whom failing, to another, is ineffectual as to the latter; but the insertion of his name does not hurt the instrument as the title of the disponee first named; nor do the qualifying words, *such of the said trustees* (if before named) *as shall accept*, so affect the identity of the disponees as to annul the sasine (*aa*). *A fortiori* is infeftment to *A. B. and the other partners of a company*, a valid investiture to the person expressed (*bb*).

5. *Delivery symbolical.*—The symbols customary in giving infeftment have been already stated; (above, § 62, Art. 5.) The delivery of symbols is not a statutory ceremony; and it has been seen that the omission to notice them in the instrument has, in particular circumstances, been disregarded, (Art. 2.); but it is plainly the duty of the conveyancer to follow the practice. In competitions of heritable rights, the Court look narrowly to the observance of practical forms. It is prudent, after mentioning what appear to be the proper symbols, to add, and *all other symbols usual and necessary.* A saving clause of this import, after the mention of the leading symbols of earth and stone, would probably be held to supply any accidental omissions.

(*a*) AFTER READING AND PUBLISHING of which feu (or blench) charter, containing the said precept of sasine, the said bailie received the same again into his hands, and by virtue thereof, and of the office of bailiary thereby committed to him, GAVE AND DELIVERED to the said B. heritable state and sasine, real, actual and corporal possession of All and Whole the lands and others particularly before specified, with their pertinents, lying and described as aforesaid, and here held as repeated, *brevitatis causa.*

(*b*) Davidson, 14th Nov. 1827, F. C., 6 S. 8.

(*c*) M. of Clydesdale, Jan. 1729, M. 14,312; Pringle, 20th Jan. 1725, M. 14,312. Here the delivery bore, however, to be in terms of the precept, which mentioned a *penny money.*

(*d*) La. Smeiton, 15th March 1631, M. 14,320.

(*e*) Somervil, 23d March 1631, M. 14,320; Urquhart, 28th July 1753, M. 9915-21, affirmed on appeal. This case was a competition of real rights. The sasine was of a right of patronage, and the clause bore, *juris solemnitatibus consuetis debite observatis.*

(*f*) Maxwell, 21st March 1628, M. 14,318. Doubts have, however, been expressed in a recent case, (M'Intosh, 17th Dec. 1825, F. C.) of the grounds of decision.

(*g*) Lammerton, Jan. 1682, M. 14,321.

(*h*) E. of Wigton, 17th June 1630, M. 14,320.

(*i*) Blackwood, 7th Nov. 1740, M. 6902, 14,327.

(*k*) Melville, 14th Feb. 1794, M. 14,327.

(*l*) Hill, 10th July 1833, 11 S. 958.

(*m*) Graham's Creditors, 3d August 1753, M. 49. See York Buildings' Company, 9th Jan. 1739, Elch. *voce* Service and Confirm. 8.

(*n*) Stewart, 21st Jan. 1815, F. C. See Wallace, 23d June 1742, M. 6919.

(*o*) M'Leod, 18th Feb. 1768, M. 8793.

(*p*) Graham's Children, 4th July 1759, M. 6931.

(*q*) Ersk. 2. 3. 48. See Graham's Children, as above; Falconer, 20th Jan. 1825, F. C., 3 S. 455; Dundas, 23d Jan. 1823, 2 S. 145.

(*r*) Bell's Princ. 877; 1 Bell's Com. 697, notes 2. and 3; More, 29th May 1805, referred to.

(*s*) Bell's Princ. 877; Cameron *v.* Cockburn, 4th June 1836, F. C., 14 D. 889.

(*t*) Mitchell, 16th July 1767, M. 14,335; Hailes, 1. 185. erroneously reported

(*u*) Stair, 2. 11. 11.

(*v*) Henderson, 8th March 1776, B. S. 5. 586; Morton, 10th Dec. 1828, F. C., 7 S. 172; affirmed, 4 W. S. 379.

(*w*) M'Ghie, 5th June 1827, 5 S. 738.

(*x*) Douglas, 3d March 1762, B. S. 5. 587.

(*y*) Livingston, 3d March, 20th July 1762, B. S. 5. 587, 888; affirmed on appeal.

(*z*) Murray, 27th Feb. 1708, B. S. 4. 701.

(*aa*) Paul, 21st Jan. 1833, F. C., 11 S. 292.

(*bb*) Dennistoun and Company, 16th Feb. 1808, M. App. *Tack*, 15.

75. TAKING INSTRUMENTS (*a*).—The asking of instruments was formerly deemed (*b*) necessary in order to retain the notary by a payment in part. It is now a mere form.

(*a*) WHEREUPON, and upon all and sundry the premises, the said procurator and attorney asked and took instruments in the hands of me, notary-public, subscribing.

(*b*) Ross, 2. 186.

76. SUMMARY OF THE RES GESTÆ (*a*).—1. *Discontiguity.*—In the tenth clause, it is essential to state that the ceremony was performed—*these things were so done*—upon the ground, or in respect of each and every subject contained in the charter, which, by reason of *discontiguity*, or being in itself a *separate tenement*, requires distinct infeftment. This is done by using the words, *respectively and successively each after other*, or equivalent terms, with reference to the subjects described in a former clause of the instrument. The question, therefore, is important, in what discontiguity and legal separation consist. (1.) It is a rule of the feudal law that every fee must have a separate investiture, without regard to situation (*b*); whence it follows that subjects lying together, granted originally by the same superior, to be holden by the same tenure but on different titles, being *legally* disjoined, require distinct infeftment in the person not only of a purchaser from the vassals, but of the disponee of such purchaser acquiring the separate subjects by one conveyance (*c*). (2.) Where subjects, again, are *locally* disjoined, the nature of the ceremony of infeftment implies that possession cannot be given

of one subject upon the ground of another; whence arises the necessity for separate sasine of each separate subject. (3.) Where, however, the subject conveyed, although legally separate from lands, is still naturally connected with them or their fruits, such as salmon-fishings, teinds, or a right of patronage, sasine need not be distinct, but the symbols only.

2. *Union.*—(1.) The Crown, as paramount superior; and thus in one sense proprietor of the whole lands in the kingdom, has the inherent power of authorising infeftment in a single subject for any number of separate tenements, and by delivery of the symbols of earth and stone for the whole. This power is exercised by means of the legal *uniön* of the several tenements. The form was originally by erection into a barony, a clause of union in a Crown charter, or a charter containing a confirmation of similar powers conferred by a subject-superior, to whom, of his own right, the privilege does not belong, although Craig expresses a contrary opinion (*d*). But he may transmit the privilege already conferred on himself, in granting a subaltern right of the same lands, provided he shall convey them entire (*e*). (2.) The mere erection into a barony, although of old conferring valuable privileges, did not, however, create a union of lands lying discontiguous for the purpose of infeftment, unless a particular place were appointed for the performance of the ceremony as for the whole (*f*); but when a place was expressly named for that purpose, although lying in a different shire from other parts of the estate, sasine given there was sufficient for the whole lands (*g*). (3.) It is probable that the modern clause of union and dispensation was framed to meet the defect above noticed (*h*). The clause is not personal to the Crown vassal obtaining the privilege, but is available to a disponee, even of a portion of the lands, whose infeftment shall proceed upon the precept in the Crown charter by virtue of an assignation, and that although the clause of union do not contain the words, *vel quavis earundem parte* (*i*). This seems, indeed, a necessary result, unless it were held that the alienation of a part dissolved the union; for where sasine may be given on any part of the lands, the dispensation must apply to the whole or to none. But the opinion of our older writers was in favour of the no-

tion, that the union was dissolved as regarded the parts alienated. It is still usual to name a place (such as the mansion-house,) at which, as well as upon any part of the lands, sasine may be given; and it is not a good objection to an instrument of sasine, bearing that sasine was given at the place so appointed, *by delivery of earth and stone of the lands disponed*, that such place is not upon the ground of the lands contained in the warrant of infeftment (*k*).

3. *Distinction between sasine as a ceremony and as an instrument.*—(1.) The practical result of the observations contained in the two last articles seems to be, that where there is no union by the Crown, infeftment must be given separately in lands and other feudal subjects which are separated by discontiguity, by distinct tenures, by holding of different superiors, or of the same superior by different charters although possessing the superiority as an undivided fee. (2.) But it is unnecessary to repeat the ceremony in respect of such rights as salmon-fishings or teinds, unless where they are unconnected with the lands contained in the conveyance, although symbols must be used appropriate to all rights in which sasine is required. The same rule applies to patronages, when once annexed to and conveyed with lands in a disposition followed with infeftment (*l*). (3.) A distinction is to be observed between sasine or infeftment, and the instrument of sasine. Although the ceremony must in point of form be repeated on each legally distinct portion of lands, one instrument only is required on each warrant. There seems, indeed, to be no incompatibility in including infeftments on several warrants in the same instrument, provided the proper stamp-duty be paid (*m*); but practice has not gone so far.

4. *Time of giving sasine.*—It is observed by Lord Stair, in treating of the formalities of an instrument of sasine, that it must bear the hour of the day at which infeftment was given (*n*). Before the establishment of the registers, the sasine first in point of time was necessarily preferred, and the hour might thus be of importance. Even after that period, but prior to the act of 1693 (*o*), questions seem occasionally to have occurred, and the preference to have been regulated by priority in the hour (*p*). At the present day, the question is of no practical importance (*q*); but it has been doubted

if infeftment is valid taken before sunrise or after sunset, or, as it is expressed, *under cloud of night*. In an early case the objection was repelled, for the reasons that the ceremony is of a private nature, and that no fraud or latency was proved by the objector (*r*); and a similar determination took place in a later instance (*s*). But from an opinion more recently expressed, that the hour is of no moment provided that sasine be given in the day time, it would appear that the point is not yet settled (*t*). In such circumstances, the safe course for the conveyancer and notary is to follow the view thus indicated by the Court. So long as infeftment remains an *actus legitimus*, it would be to deprive it of all pretensions to solemnity or authenticity, to perform the ceremony at an hour when the witnesses could with difficulty observe the procedure, and the notary would be unable to publish the warrant by reading it.

5. *Names and designations of the witnesses.*—The witnesses must be inserted according to rules elsewhere explained; (above, § 14. 6.) They are called to witness and attest the facts, and not the subscription of the notary.

(*a*) THESE THINGS WERE SO DONE upon the ground of the said lands and others (respectively and successively *if legally discontiguous*) betwixt the hours of and of the day of the month in the year of our Lord and of the Queen's reign respectively above written before and in presence of E. and F. witnesses to the premises specially called and required and hereto with me subscribing.

(*b*) Ersk. 2. 3. 44.

(*c*) B. of Scotland, July 1729, M. 16,404.

(*d*) Craig, 2. 7. 17. 18; Mack. 2. 3. 20; Stair, 2. 3. 44; Ersk. 2. 3. 46; Aitken, 16th Jan. 1628, M. 16,397; La. Borthwick, 16th Dec. 1628, M. 16,399, and Jan. 1638, M. 16,401.

(*e*) Stair, 2. 3. 44, par. 2; Stewart, 25th Jan. 1627, M. 6623; Blaquhan, 7th July 1637, M. 16,401.

(*f*) Stair, last cit.; L. Clackmannan, 16th Nov. 1630, M. 16,399; L. of Lauriston, 19th March 1636, M. 14,330; La. Ednem, 23d July 1628, M. 16,398. Erskine, 2. 3. 45, maintains that union implies the sufficiency of infeftment on any part, even where a particular place is not mentioned, as for the whole lands, and this seems to be the proper interpretation of a clause of union. But his opinion appears to differ from that of Stair as well as from the decided cases. It is probable that the doctrine established by these last was the cause of the express provision in the modern clauses of union and dispensation, that sasine taken on any part of the lands should be sufficient for the whole or any particular portion of them.

(*g*) Fas, 12th June 1673, M. 16,463.

(*h*) PORRO nos volumus et concedimus et pro nobis nostrisq. regiis successoribus decernimus et ordinamus quod ulla sasina seu sasinæ nunc et in omni tempore futuro per dict. A. vel ejus prædict. suscipiend. apud mansionis domum de C. vel super fundum ullius partis seu portionis terrarum aliorumque antea disposit. per traditionem terræ et lapidis fundi earundem solummodo sine necessitate ullius alii symboli est et erit tam valida et efficiens sasina pro dict. integris terris decimis aliisque antea disposit. seu pro ulla parte vel portione earundem quasi particularis sasina super unamquamque partem et portionem earundem et per traditionem omnium consuetorum symbolorum suscepta fuisset non obstan. separata sint tenementa diversarum denominationum jaceant discontigue et separatas sasinas et diversa symbola requirerent.

(*i*) Skene, 19th Jan. 1768, M. 8792, as reversed 1768; Montgomery, 2d March 1813, F. C.; Heron, 14th Feb. 1771, M. 8684.

(*k*) Dennistoun, 7th July 1824, F. C., 3 S. 218.

(*l*) Ersk. 2. 3. 44; Urquhart, 27th June 1752, M. 9915

(*m*) Mackintosh, 12th May 1831, 9 S. 583.

(*n*) Stair, 2. 3. 17.

(*o*) 1693, c. 13.

(*p*) E. of Home, 29th July 1627, B. S. 1. 237.

(*q*) Bell's Conv. of Land, p. 214-15.

(*r*) Arnot, 19th Nov. 1679, M. 14,332.

(*s*) Douglas *v.* Elphinstone, 1768, noticed in Bell's Conv. of Land, p. 215.

(*t*) Dennistoun, 14th Nov. 1824, F. C., 3 S. 285.

77. NOTARY'S DOQUET (*a*). — 1. *Office of notary.* — The origin of the office of notary is matter more of curious than useful inquiry. Craig (*b*) informs us that our notaries correspond to the *tabelliones* of the Romans, in whom, as appears from the 73d Novel of Justinian, great trust was reposed in the preparation and authentication of writs. In that age the imitation for fraudulent purposes of true documents, (*nihil aliud falsitas nisi veritatis imitatio,*) had become a study, and called for an express law to repress it, from which it is probable that our system of authentication is derived (*c*). The *tabelliones* (or Registrars) of the Romans were by that edict intrusted with the preparation and authentication of writs (*d*), which were at first made out under judicial authority. Afterwards the forms were gone through in private, and the officer to whom they were intrusted received the name of *Notarius, quod notas ex loquentium sermonibus et dictatis exciperet, quas postea in publicam formam redigebat et extendebat* (*e*). It is observed by Craig (*f*), that as the employment of notaries arose out of the forgery of private writings, so from the crimes of notaries, confidence in these returned,—a severe commen-

tary on the vices of the clerical notaries. Notaries were at an early period appointed by the Emperor or Pope, and thence called imperial or apostolical. They now derive their authority from the Sovereign, through the medium of the Supreme Court.

2. *Privileges of notaries.*—The privileges of notaries extend over the whole kingdom, under certain inconsiderable exceptions. (1.) Sasines passing upon precepts issued from the Queen's Chancery for the infeftment of heirs can be taken and authenticated only by the sheriff-clerks of the counties where the lands lie respectively, or their deputes, the Sheriff officiating as the Sovereign's bailie (*g*). (2.) In burgage subjects, an exclusive privilege of the same description belongs to the town or common clerk (*h*). (3.) The sheriff-clerks of counties, and the town-clerks of burghs, must necessarily be notaries, to be enabled to authenticate the instruments proceeding upon warrants executed by them. (4.) When it happens that the town-clerk of a burgh is proprietor of subjects within the burgh, the court will authorise the sheriff-clerk to officiate for him in giving sasine in such property (*i*). See *Burgage Rights.* In a similar situation, the sheriff-clerk-depute in practice officiates for his principal. (5.) Notaries, as public officers, may be compelled to serve the lieges in their office on tender of the legal fees (*k*). (6.) They do not appear to be disqualified by reason of relationship, but by interest only, although it has been doubted if a notary can officiate in virtue of a warrant contained in his own deed (*l*).

3. *Notary's protocol.*—At a former period, notaries kept a record book, called a *protocol*, in which they entered, with more or less regularity, the instruments of importance prepared by them, such as instruments of sasine and of resignation. It was occasionally of benefit to their employers, so long as the notary as well as the witnesses to an instrument were alive, as a duplicate made out from the copy entered in the protocol, and attested by the notary and witnesses, was received as equivalent to the original instrument (*m*). The protocol is now practically neglected, although a book bearing that name is still issued to each notary on his admission.

4. *Terms of the doquet.*—The certificate or doquet, (an

old English term for a brief or summary of a longer writing,) adhibited by the notary in attestation of the facts contained in the instrument, is of very ancient date, the form of the doquet in the instrument of sasine given in the Appendix to Mr Erskine's larger work (*n*) being almost *verbatim* the same as that now in use. (1.) The doquet is in the handwriting of the notary, and consists, in so far as respects the ceremony, substantially of a statement by that officer that he was present with the witnesses, and saw, heard and was cognisant of the facts narrated in the instrument, and had framed and subscribed it in testimony of their truth. Accordingly, when the doquet bears not the personal presence of the notary, the sasine is invalid (*o*); and the omission of the words, *vidi, scivi et audivi*, have been held fatal to the instrument (*p*). (2.) But as *mala grammatica non vitiat chartam*,—bad grammar does not vitiate a writ, a mere error in syntax is disregarded; as are likewise blunders in spelling and omissions of words, provided the substantial facts are expressed (*q*). It is a matter of much difficulty, however, to particularise what are to be considered the essential parts of the doquet (*r*); and it is the duty of the notary, so long as the present mode of authenticating instruments of sasine is allowed to exist, to copy the doquet word for word either from his commission or the style-book. (3.) Craig asserts that the omission of the concluding words, *rogatus et requisitus*, vitiates the instrument, because a notary can do no official act unless called on to perform it, and requisition, he states, will not be presumed except in regard to the witnesses (*s*). Later writers do not instance these words as essential.

(*a*) See above, page 30.
(*b*) Craig, 2. 7. 7.
(*c*) Nov. 73. Pr.
(*d*) Stair, 2. 3. 19.
(*e*) Craig, as above.
(*f*) Craig, as above.
(*g*) 1606, c. 15.
(*h*) 1567, c. 27.
(*i*) Duff, 16th Jan. 1823, 2 S. 117.
(*k*) Innes, 29th Feb. 1612, M. 13,089
(*l*) See above, § 11; Sim, 2d Dec. 1831, 10 S. 85.

(m) Ramsay, 2d Jan. 1678, M. 13,553; Lindores, 12th June 1706, B. S. 4. 648.

(n) Erskine, App. 4.

(o) Macintosh, 17th Nov. 1825, F. C., 4 S. 190.

(p) Primrose, 22d Dec. 1612, M. 14,326.

(q) M'Intosh, as above; M'Ghie, 5th June 1827, 5 S. 758.

(r) See opinion of Lord Alloway, in Macintosh, above.

(s) Craig, 2. 7. 21.

TITLE IV. REGISTRATION OF THE SASINE.

78. ORIGIN OF THE SYSTEM. — In the constitution and transmission of land rights, there are three parties who have an interest, the superior or granter, the vassal or disponee, and the public. The two first are bound by the terms of the grant; but to make its conditions obligatory on third parties contracting with either, they must be published in the manner prescribed by law. At a remote period, the grant was made or renewed in presence of the *pares curiæ*, who at that time formed a body perhaps sufficiently numerous for all the purposes of publicity. In the course of ages when agriculture had improved, and wealth and population become more abundant, the mode of investiture, in place of assuming a form adapted to the change, acquired a more private character; and the giving of sasine was evidenced at first by the certificate of the superior's bailie, and afterwards by means of the instrument of sasine. Although a considerable number of persons appear occasionally to have been present, the ceremony of infeftment could, in the general case, furnish no adequate information to the public, even in the district where it was performed. Nor was the evil diminished by means of the protocols issued to the notaries, in which it was their duty to insert all instruments of importance. They do not appear to have been under any effectual superintendence (*a*), and those sasines which they chose to transcribe were useful not to the public, but to their own employers, who were thus enabled, on the loss of the principal instrument, to obtain an authentic duplicate of it. It was thus out of the power of creditors or purchasers to discover what real burdens attached to lands. The first dawn of a better system appears in a statute (*b*), which permitted the registration of rights of reversion granted

by wadsetters, for preservation, in the King's register. This was followed up by certain provisions contained in regulations made for the collection of the Crown revenue. By an act passed in 1503 (*c*), Sheriffs of counties who gave sasine to vassals of the Crown were appointed to write in their court-books the dates of the sasines passing on Crown precepts, and bring the same to Exchequer; and by a statute of James V. the duty was imposed on the sheriff-clerks, of bringing yearly to Exchequer the books containing the sasines given by the Sheriffs. The register thus instituted was consequently of sasines on precepts from Chancery alone; and another act passed in the reign of Queen Mary (*e*), ordaining all persons within year and day to produce their sasines to the sheriff-clerks of the respective counties where their lands lay, in order that the day and month, the name of the lands, and the names of the notary and witnesses might be inserted in their court-books; and each clerk was appointed to bring his books to Exchequer, and leave a duplicate of such part as related to sasines, "subscribed with his hand and sign-manual," to remain in the register with a duplicate of his own protocol, that all persons having interest might have recourse thereto. These acts were nearly inoperative, and the last appears to have fallen into almost total neglect (*f*). Although the statute of James V. was renewed in 1587 (*g*), the regulations thus introduced obtained no permanent footing, and those notes or abbreviates even which were registered gave no satisfactory information, as they did not bear the burdens and conditions with which the right might be clogged. Acts were therefore passed (*h*), which provided that the full tenor of sasines, and of several other real rights, should be registered within forty days after their dates, in the register of the Secretary of State, under the sanction of nullity. These statutes appear to have been but imperfectly obeyed. The last in date is referred to in an Act of Sederunt, dated in 1604, which repeated a great part of its provisions, but, as it would appear, to little purpose. At length was enacted that important statute (*i*), which forms the groundwork of our admirable system of registration of land rights.

(a) Erak. 3. 2. 39; Ross, 2. 202-3.
(b) 1469, c. 27.
(c) 1503, c. 89.
(d) 1540, c. 79.
(e) 1555, c. 46.
(f) Ross, 2. 205.
(g) 1587, c. 64.
(h) July 1599, Nov. 1600, unprinted.
(i) 1617, c. 16. Oure Soveraine Lord considering the great hurt sustained by his Majesties liegis by the fraudulent dealing of parties who haveing annallied their lands and received great sumes of money therefor, yet be their unjust concealing of sum privat Right formerlie made by them rendereth subsequent alienation done for great sumes of money altogether unprofitable which cannot be avoided unless the saidis privat Rights be made public and patent to his Highnes' Liegis: For remedy whereof and of the many inconveniences which may ensue thereupon his Majestie with advice and consent of the Estates of Parliament STATUTES and ORDAINS that there shall be ane public Register in the which all Reversions Regresses Bands and writs for making of Reversions or Regresses assignations thereto discharges of the same Renunciations of Wadsets and grants of Redemption and sicklike all Instruments of seasing, shall be registrat within threescore days after the date of the same: It is always DECLARED that it shall not be necessary to registrat any Bandis and writtis for making of Reversions or Regresses unless seasing pas in favours of the parties makers of the saidis Bandis or writtis. In the which case it is ordained that the samen shall be registrat within threescore days after the date of the seasing. The extract of the which Register shall mak faith in all cases except where the writtis so registrated are offered to be improven. And gif it shall happin any of the saidis writtis which are appointed to be registrat as said is not to be dewly registrat within the said space of threescore dayes then and in that case his Majestie with advice and consent foresaid DECERNES the same to mak no faith in judgment by way of action or exception in prejudice of a third partie who hath acquired ane perfect and lawful right to the saidis landis and heritages but prejudice alwayes to thame to use the saidis writtis against the partie maker thereof, his heires and successours. It is alwayes DECLARED that this present Act shall no wayes be extended to Instruments of seasing and Reversions therein contained given by Provost and Bailies of free Burghs-royal of lands lying within their Liberties and Freedomes halden by the saidis Burghs in free burgage of his Majestie nor to na other heritable writtis thereof, nor yet to Reversions incorporat in the body of the Infeftments maid to the persons against whom the said Reversiones are usit: It is also DECLARED that gif any Renunciationes or Grantis of redemption which shall happen to be consignit in processe betwix parties shall be registrat within threescore dayes after the dates of the decreets whereby the same shall be ordained to be given up to the pairties having right thereto, the same shall be sufficient. And to the effect the said Register may presently and in all time cuming be the more faithfully keepit Therefore our said Sovereign Lord with advice and consent foresaid STATUTES and ORDANIS the same Registers and registrations foresaid to be insert therein to appertain and belong to the present clerk of register and his deputtis to be appointed by him to that effect and decerns and ordains the same Registers to be annexed and incorporated with the said office

And that the Clerk of Register present and to cum have the said office as ane proper part and pertinent of the Clerk of Register his office mak and constitute particular deputes ane or ma for all the dayes of their lifetimes or otherwayes as he shall think expedient of good fame literature and conversation for whom he shall be answerable and who shall be resident within the tounes and places after specified at all times to receive fra the parties their evidents and to registrat the same within the space of fortie-aucht houres next after the receipt thereof and to ingrose the haill bodie of the write in the Register under the pain of deprivation of the Clerk of his place and service and of the office of Notarie in all time thereafter. And within the same space shall deliver to the presenters of the samine the evidentis markit by him with the day moneth and year of the registration and in what leaff of the book the same is registrat and shall take allenarly for his paynis 26s. 8d. money of this Realme as for the price of ilk leafe of his Register containing no les than in this present Act, and in case the leafe contain les to take les accordingly and so proportionallie for every page of the leafe and part of the paige, and according thereto shall take for registring of every ane of the said evidents. And the saidis Registeris to be filled by the saidis deputtis to be marked by the Clerk of the Register and his deputtis to be appointed by him to that effect with an note of the particular number of the leiffis that the same shall containe and the saidis Registeris after the filling up of the same to be reported to the said Clerk of Register to remain with him and his deputes and be patent to all our Soveraine Lordis Liegis and extracts thereof to be given by him and his deputtis to be appointed by him during all the dayes of their lifetime or otherwayes as he shall think expedient for that effect to all shall have adoe with the same which shall mak as great faith as the principallis except in case of improbation. And the saidis Registers for the greater ease of the Liegis to be established in the princip l places following viz. (places inserted) or any other place or places more convenient as the Clerk of Register shall think most expedient dew intimation being made to the Liegis of the same. And the saidis evidentis to be registrat in the particular books appointed for the lands within the bounds of ilk Sheriffdome Stewartrie and Bailzerie as said is or in the option of the party in the books of Register or Session keiped by the said Clerk Register himself or his deputtis to be appointed by him during all the dayis of their lifetime or otherwayes as he shall think expedient to that effect in Edinburgh and our said Soveraine Lord with advice and consent of the Estates decerns and declares this present Act to have the force strength and effect of ane Decreit and Statute of Parliament which shall have force strenth execution according to the tennoure thereof in all tyme to cum. Ordaining publication to be made of the same in forme as effeiris.

79. REGISTRATION ACTS.—1. *Act of* 1617 (*a*).—The preamble of the statute narrates the "fraudulent dealing of parties, "who having annailzied their lands, and received great sums "of money therefor, yet by their unjust concealing of some "private right, formerly made by them, rendereth subsequent "alienation done for great sums of money altogether unprofit-"able, which cannot be avoided unless the said private rights

" be made public and patent." It ordains that there shall be a register in which all reversions, regresses, bonds for making the same, assignations and discharges thereof, renunciations of wadsets, grants of redemption and instruments of sasine, shall be inserted within sixty days after their dates. The register is placed under the direction of the Clerk Register and his deputes. The kingdom is divided into districts, and a special, or as it is called, a *Particular Register*, appointed to be kept in each district, in which, or in the *General Register* established at Edinburgh, the rights must be recorded. Where the lands lie wholly in one district, the right may be registered in the register of the district; and where in more than one, in the Particular Registers of the several districts. In either case it may enter the General Register at Edinburgh. The keeper of each register is appointed to record the deeds within forty-eight hours after receiving them, and to *engross the whole body of the writ* in the register, under the pain of deprivation; and, within the same space, to redeliver to each presenter the deed presented by him, marked with the day, month and year of the registration, and in what leaf of the book it is registered. The books of record, before being issued to the keepers, are to be marked in a particular manner by the Register or his deputes; and after they are filled up, to be returned to them, to remain in their keeping for public inspection. Extracts from the register are declared to be probative, except in improbations. Sasines not thus registered are to make no faith in judgment by way of action or exception, in prejudice of a third party who has acquired a " per-" fect and lawful right" to the lands and heritages contained in them, without prejudice, however, to those in whose favour they are conceived to use the writs expressed in the act, " against the party maker thereof, his heirs and successors."

2. *Acts of* 1696, *&c.*—(1.) By the law and practice prior to the statute of 1617, the date of the instrument was the rule of preference; due registration thenceforward became necessary to support the right in questions with third parties, and thus a registered sasine is preferable to a prior sasine unregistered. Doubts were, however, entertained, although the point does not appear to have been judicially discussed,

if, when two instruments, both affecting the same subject, were registered within the sixty days, that first registered, if last in date, ought to be preferred to the other (*b*). These doubts were removed by a statute (*c*), which, as deeds unregistered continue latent in regard to the public, declares that the sasine first registered, although posterior in date, shall be preferable to the prior deed. (2.) Another defect consisted in this, that the statute prescribed no certain means for the transcription or booking of the sasines left with the keepers, in the order of their presentation. From the great number of the deeds presented for registration, it became impracticable to obey the provision, that the keeper should engross the whole body of the writ in the register and return it to the presenter within forty-eight hours after receiving it. The one requisite or the other was often neglected. Sometimes deeds were returned with an attestation in terms of the act, without having been booked; but more frequently they remained in the custody of the keeper for a long period (*d*); and he had thus the means, if he felt the desire, of preferring one party to another To remedy the latter of these evils, the keepers were appointed (*e*) to make exact minute-books relating to the register, "containing the names and designations of the parties, and the common designation of the lordship, barony or tenandry of the several lands mentioned in the writ," which were to be compared with the register, and subscribed by the Clerk-Register, or persons appointed by him, every quarter of a year. These minute-books had a tendency, however, to increase the evil, for the keepers were thus enabled to return sasines to the presenters unbooked, but with the usual certificate of registration, at the same time that they retained a memorandum of the writ, which probably, in most instances, answered the purpose of a search of the register; and so prevalent was the omission to enter the full tenor of the sasine in the register, that, out of sympathy for individuals, an act was passed, strongly disapproved of by Stair, which, in effect, legalised the neglect of the keepers (*f*). This act was in force until the year 1696, when it was declared by statute (*g*), that no sasine or other real right, appointed to be registered by the act of 1617, should be of force unless

booked and inserted in the register. (3.) In the meantime, the minute-book had been brought into form by another important statute (*h*), which provides that the minute-books shall express the day and hour when, and the names and designations of the persons by whom the writs shall be presented; and that each minute shall be immediately signed by the presenter of the writ, and also by the keeper; and that the writs shall be registered exactly in the order of the minute-book. (4.) Burgage sasines, which were excepted in the act of 1617, were brought within its scope by a statute passed in 1681 (*i*); but it is provided that the burgh registers shall be kept by the town-clerks, and depend on their own magistrates, and not on the Clerk-Register, by whom or by his deputes the books are, however, marked and issued to the town clerks. The General and Particular Registers, properly so called, are not only marked by that officer or his deputes, but likewise kept under his charge in the Great Register Office at Edinburgh, after being filled up and returned by the several keepers (*k*). The appointment of the keepers belongs to the Crown.

(*a*) Above, p. 120.

(*b*) Ersk. 2. 3. 42.

(*c*) 1693, c. 13. Our Sovereigne Lord and Lady the King and Queens Majesties, for the better clearing and determining of competitions and preferences of real Rights and Infeftments do hereby with the advice and consent of the Estates of Parliament ENACT STATUTE and DECLARE that all infeftments whether of property or annualrent, or other real rights, whereupon sasines for hereafter shall be taken, shall in all competitions be preferable and preferred, according to the date and priority of the registrations of the sasines, without respect to the distinction of base and publick Infeftments, or of being clad with possession, or not clad with possession in all time coming.

(*d*) Ross, 2. 211.

(*e*) 1672, c. 16, § 32. See A. S. 15th July 1692.

(*f*) 1686, c. 19. See Stair, 2. 3. 22; 4. 35. 22.

(*g*) 1696, c. 18. OUR SOVEREIGN LORD CONSIDERING that unless seasins and other writs and diligences appointed to be registrat be booked and insert in the respective registers appointed for that effect the Liedges cannot be certiorat thereof which is the great use and design of their registration Doth therefore with advice and consent of the Estates of Parliament *statute and declare* that no seasine or other writ or diligence appointed to be registrat shall be of any force or effect against any but the granters and their heirs unless it be duly booked and insert in the register And that notwithstanding of any thing contrary hereto contained in the 19th act second session first Parliament of King James VII.

which is hereby in so far rescinded cassed and annulled and declared to have no effect in time coming But prejudice always to such as have registrat their seasins and other writs and diligences conform to the said Act before the making hereof. And his Majestie with advice foresaid ratifies and approves of the haill other heads and articles of the said Act and declares that parties lesed by the omission or negligence of clerks to book and insert in the Register such writs as are presented to them and which they attest on the back to be registrat shall have action of damnadge against the heirs and representatives of the saids clerks though no such actions be commenced in the clerk's lifetime.

(*h*) 1693, c. 14. Our Soveraigne Lord and Lady the King and Queens Majesties CONSIDERING that the many good acts appointing registers of sasines, reversions, hornings, inhibitions, interdictions, allowances of apprisings or adjudications, that purchasers and creditors might know with whom they might safely contract have been much frustrated by the Keepers of the Registers not inserting the same in the Registers at the time, and in the order they were presented to them, whereby none could know by inspection of the Registers, what writs appointed to be registrate were in the hands of the Keepers of the Registers, and thereby could not securely bargain. For remeid whereof their Majesties with advice and consent of the Estates of Parliament doe STATUTE and ORDAIN that all the keepers of the said Registers, shall keep minute-books of all writs presented to them to be registrate in their several Registers expressing the day and houre when, and the names and designations of the persons by whom the saids writs shall be presented, and that the said minut be immediately signed by the Presenter of the writ and also by the Keeper and patent to all the Lieges who shall desire inspection of it *gratis*, And that the writs shall be registrat exactly, conform to the order of the said minute-book, all under the pain of deprivation of the Keeper of the Register. And further their Majesties with consent foresaid DECLARE the saids Keepers not observing the premises lyable to the damage of the parties prejudged, by the not due observing of this present Act.

(*i*) 1681, c. 11.

(*k*) Campbell, 3d March 1795, M. 13,140.

80. PRESENT SYSTEM OF REGISTRATION.—The act of registration consists, or ought to consist, in the following steps:

1. *Entry in the minute-book.*—The entry in the minute-book or index of the register, must or ought to be immediately subscribed by the presenter of the writ and the keeper (*a*); and this is the more necessary, as the minute-book is necessarily the test of the date of registration so long as the sasine lies with the keeper for the purpose of registration (*b*). But in practice, a custom has been introduced by some keepers, of using a mere note-book, in which each sasine is shortly described, and the entry subscribed by the ingiver at the time of presenting. The regular minute-book is prepared at lei-

sure by the keeper; and after the sasine has been booked, the entry in the minute-book is subscribed by the person, whether the presenter or not, who takes out the writ and pays for its registration. There seems to be no authority in the statutes for this practice; and although, in a well-regulated office, it may be observed without much risk, yet the keeper might be exposed to serious responsibility were the note-book to be lost, or destroyed in whole or in part, before the minute-book had been made up, or, when made up, should the minute-book altogether omit the entry of any deed, an occurrence which cannot by possibility happen when the minute is prepared at sight of the presenter. The practice involves also this considerable deviation from the statute, that the actual presenter of the writ often does not subscribe the entry in the regular minute-book. It is true there is no nullity declared in the case of any such deviation; but as the statute contains a heavy sanction as against the keeper, he might incur considerable risk if a sasine taken out by the wrong person were to be lost. The danger even to the parties appears from an election case decided in 1774 (*c*), in which the Court, after inquiring into the practice, with difficulty sustained a sasine as duly registered, where the entry in the minute-book had not been signed by the presenter and keeper of the date of the presentment. But in a competition of real rights the result might have been different. Put the case, that in place of a question upon the omission to subscribe the minute-book of its date, it should happen that a party aware of an attempt to defeat his right by priority in registration, should present his sasine *after* the ingiving of another sasine over the same subject, but *before* this last had been entered in the regular minute-book. The party might, with some shew of reason, insist that his sasine should be minuted, in terms of the statute, before any other entry were made, and the minute *immediately* subscribed by himself and the keeper, in order that he might have the benefit of the injunction, that writs shall be registered exactly conform to the order of the minute-book (*d*). It seems proper, therefore, that due time should be afforded for authenticating the entry of writs in the minute-book in terms of the statute.

2. *Booking.*—The booking or transcription of the whole

body of the writ into the register is the second step in the act of registration. As already observed, this is the ultimate test of registration and the essential part of the act, and it is here that the blunders have been committed which have produced so much vexatious litigation. (1.) As it is physically impossible to book the writs presented for registration within the period of forty-eight hours prescribed by the act of 1617, the rule is adopted in practice, on the authority of a decision (*d*), that they shall remain in the custody of the keeper and be transcribed into the register in the order of the minute-book without undue delay. At an early period, the Court refused to authorise the insertion of a sasine in the register of the date expressed in the minute-book, but out of its due order, which had been marked in the minute-book, and then carried away by the party to be produced in an action (*e*). (2.) Still it has been doubted if it is essential to the act of registration that a sasine shall be entered in the register in the order of the minute-book. The words of the statute (*f*) are, that the writs "shall "be registrate exactly, conform to the order of the said minute-"book;" and the sanction is directed against the keeper only, who is subjected to damages and deprivation of office. In one case (*g*), a sasine so irregularly booked was held not to be duly registered; but a contrary judgment was in a later instance pronounced (*h*). In the latter case, it was noticed as a bad practice to prefix the date of presentment to the writ as transcribed into the register; and with respect to the booking being out of the order of the minute-book, the Court held that obedience to the statute was not essential as regarded the party, but inferred only the punishment of the keeper. It was considered to be enough that the minute-book referred to the register by the volume and the numbers of the leaves occupied by the writ: and in a question as to the mode of presentment and of recording, the minute-book and register were held as proof of the facts certified by them respectively, not to be redargued by parole evidence. These were, however, election cases, and involved not the question of priority, but of invalidity for the purpose for which the sasine was used. (3.) Where sasines in competition hold a different place in the minute-book and register, the words of the statute (*i*), that

infeftments "shall in all competitions be preferable and pre-"ferred according to *the date and priority of the registrations*," seem necessarily to imply that the sasine first entered not in the minute-book or index, but in the register itself, shall be preferred. The registration of any particular sasine within the sixty days is held to be proved, before actual transcription, by the entry in the minute-book, from the necessity of the case, since, when a number of writs are presented within a short period, some of them must lie for a considerable space in the possession of the keeper before being actually booked; but after the minute-book and the register have been brought down to a particular day, although the minute-book will be sufficient evidence that any one sasine has been presented for registration within the statutory period, it cannot, it is thought, affect the question of priority between that and another sasine which has likewise entered the register. That question is one not simply of time but of precedency, and the precedency, according to the statute, is of the *registration*. (4.) When the minute-book and register agree, the sasine first in order is preferable, and there is no room, in any circumstances, for a *pari passu* effect (*k*). Where it is intended, therefore, that securities shall rank in the same order, a declaration to this purpose must be inserted in the bonds and sasines. (See *Sasine on Conveyances in Security.*)

3. *The attestation of the keeper.*—(1.) The certificate or attestation added by the keeper at the end of the instrument is the third step in the act of registration. It is now of little importance, unless for the information of the party in whose custody the sasine remains, although at one period furnishing statutory evidence of the registration (*l*). The nature and object of registration preclude the notion that an error in the date of the attestation can have any effect on the validity of the title, and more importance seems to have been attached to it than it deserved. (2.) The Court have, on the death of a keeper, authorised his successor to attest the registration (*m*), and, in one instance, an interim keeper was appointed for that purpose (*n*).

(*a*) 1693, c. 14, above, p. 126.

(*b*) Mackenzie, n. r. noticed in Wight, p. 221. See Skelly, below.

(c) Skelly, (or E. of Fife), 7th and 8th July 1774, M. 8850; B. S. 5. 589.

(d) Mackenzie, as above; Wight, as above. See Dunbar, 10th March 1790, M. 8799.

(e) Marr, March 1684, M. 13,557.

(f) 1693, c. 14, above, p. 126.

(g) Drummond, 24th June 1809, F. C.

(h) Adam, 19th June 1810, F. C. See Ersk. (Ivory's edit.) p. 285, note 59; Bell's Com. 1. 679; Bell's Conv. of Land, p. 241, note.

(i) 1693, c. 13, above, p. 125.

(k) Douglas, &c. 21st Feb. 1835, F. C., 13 S. 505. See note to Lord Moncreiff's interlocutor.

(l) 1686, c. 19.

(m) Young, 20th Dec. 1749, M. 13,575; Ballantyne, 15th Nov. 1750, M. 13,575.

(n) Campbell, 8th Aug. 1753, Elch. *Sasine*, 9.

81. ERRORS IN THE REGISTER.—(1.) It may be stated as a general rule, that the copy of the sasine in the register must correspond, in all essential particulars, with the principal writ. Thus, where part of the lands were omitted, the instrument was to that extent held not duly registered (a). The same result has attended the erroneous transcription of essential words, such as the date of the instrument, or the year of the Sovereign's reign as specified in the warrant of the sasine (b). This rule follows necessarily from the terms of the statute of 1617, for a sasine is plainly not registered as respects those parts which are omitted or blundered in transcription. (2.) The Court will not authorise the correction of even a clerical error in booking, for the reason that, as third parties can have no opportunity of being heard, the correction, or rather alteration of the register, would be inoperative (c). (3.) A practice having arisen of omitting the formal part of the doquet in transcribing the instrument, the Court, by Act of Sederunt (d), appointed the keepers to engross in the register the full tenor of the doquet; and, in consequence of a common practice with the town-clerks, of omitting or abbreviating the doquet in registering burgage sasines, an act was recently passed (e), which validates those sasines that had thus been imperfectly registered, but provides that the notary's doquet shall in future be engrossed at length in the register, under the same sanction and reservation as in the act of 1617.

(a) Gray, 23d Feb. 1790, M. 8796; E. of Fife v. Stewart, 20th Feb. 1827, F. C. (p. 368 of the vol.) 5 S. 383.

(*b*) Macqueen, 23d Jan. 1824, F. C., 2 S. 637; Dennistoun, 16th Nov. 1824, F. C., 3 S. 285.

(*c*) Innes, 20th Dec. 1816, F. C., altered by Dundas, 15th Dec. 1824, F. C., 3 S. 400.

(*d*) A. S. 17th Jan. 1756.

(*e*) 10 Geo. IV. c. 19.

82. SUGGESTION FOR ALTERING THE PRESENT SYSTEM. —The system of registration introduced by the act of 1617, and improved by subsequent statutes, may be regarded as nearly complete, and its efficacy is greatly aided by the admirable manner in which the details are conducted under the existing management and superintendence. The author would, however, with much hesitation, venture to observe, that the practice of copying the writ into the books of record appears to be of very doubtful propriety. It has given rise to considerable litigation, produced by the blunders of persons over whom the parties have no control, and is the cause of much inconvenience to those who have early occasion to produce their sasines in a court of law. In place of the system of booking the writs left for registration, (excepting for the use of the public,) the deed, it is thought, might with advantage be presented to the keeper in duplicate, the duplicates for the register being written on uniform paper, and authenticated by the notaries and witnesses in the same manner as those engrossed on vellum. The writs would then be compared by the keeper with the agents of the parties, and the duplicates left in the office bound up in volumes corresponding with the minute-book. In this manner a party, and the agent or notary employed by him, would be responsible for the accuracy of their own writ. Questions depending on the validity of the instrument would, as at present, be determined by a reference to the register; and, on the loss of the duplicate engrossed on vellum, and kept by the party as under the present system, it might be replaced either by an extract issued under the authority of the Clerk-register, or by a new instrument made out by the notary from the register, and authenticated by him and the witnesses. An action of proving the tenor would thus, in every instance, be unnecessary, the register being made a universal protocol. The author can perceive no valid objection to the introduction of such a sys-

tem, for which the present practice of recording signatures in Exchequer forms in some measure a precedent. For the purpose of examination by the public in the General Register Office, a copy from the principal register would be necessary, to which purpose the large fees derived from searches in the registers might in part be applied (*a*).

(*a*) This suggestion was submitted by the author, several years ago, to a committee of the body to which he belongs.

83. EFFECT OF A SASINE UNREGISTERED. — (1.) Since the introduction of the registers, infeftment no longer confers a real right in lands, unless the sasine be duly recorded. It was long a prevalent opinion, that an instrument of sasine unregistered was not absolutely null, and the notion was founded on the terms of the reservation in the end of the statute of 1617 (*a*). In several early instances (*b*), the sasine was considered as not to every effect invalid; but besides that it is remarkable that none of these cases are noticed by Lord Stair or Mr Erskine, they were decided during a period when the views respecting the true object of registration were so obscure, that a mere certificate on the sasine was repeatedly held equivalent to actual transcription into the register, a course which was even sanctioned by an express statute. But, even during that early period, the cases do not seem to have proceeded on any uniform principle. In one instance the true purport of the reservation was recognised (*c*); it was regarded as a mere saving clause against the parties, who would, at any rate, have been liable in the warrandice of the conveyance. After the necessity of booking the instrument had been acknowledged in the repeal of the statute of 1686, few cases are to be found in the books, probably from the circumstance that due registration had become nearly general. In one instance, noticed by Erskine (*d*), the sasine was sustained against the heir of the granter of the warrant; but in another case (*e*), where an adjudger had acquired right from the nearest heiress served to her father, who had conveyed the property to a son predeceased, the important principle was recognised, that the father had not been divested by the unregistered sasine of his disponee, and

the adjudger of the right acquired by the daughter by service was preferred to an adjudger of the *hæreditas jacens* of the son. (2.) The doctrine maintained by Erskine (*f*) is apparently not inconsistent with these observations, for a vassal cannot object to the sasine of his superior, because it is the foundation of his own right (*g*). That learned author seems therefore to have concurred in the view expressed in the case of Carmichael, that the reservation in the statute applies to those parties only who are liable in the warrandice of the conveyance. (3.) The point has now, however, received the solemn decision of the Court (*h*), and the result is highly important in this respect, that it puts an end to the doubts entertained by conveyancers in regard to the effect of an unregistered sasine as evidence on a special service. But, in practice, the profession have been much guided by the opinions of the Lord Justice-Clerk and the late Lord Meadowbank, in the case of Kibble (*i*), in favour of the notion that a null sasine does not exhaust the precept, and have been in use to take infeftment of new where the first sasine had by mistake remained unregistered.

(*a*) 1617, c. 16, above, p. 121.

(*b*) Gray, 24th March 1626, M. 13,540; L. Cranstoun, 18th Feb. 1631, M. 7801; Rowan, 21st July 1638, M. 13,546; Simpson, 28th June 1678, M. 13,553; Dalmahoy, 14th Nov. 1678, M. 5170.

(*c*) Carmichael, Dec. 1685, M. 13,558.

(*d*) Ersk. 2. 3. 40; Ludquhairn, 30th June 1705, M. 13,562.

(*e*) Erneslaw, 29th Nov. 1705, M. 13,564.

(*f*) Ersk. last ref.

(*g*) Faa, 12th June 1673, M. 16,403; Hill, 10th July 1828, 6 S. 1133.

(*h*) Kibbles, 18th Dec. 1830, F. C., 9 S. 233. See Fulton, 15th Feb. 1831, F. C., 9 S. 442.

(*i*) Kibble, 16th June 1814, F. C.; Baxter, 2d Dec. 1818, and Keltie, 1818, n. r., both noticed in case of Kibbles, above.

84. FEUDAL EFFECTS OF THE CHARTER AND REGISTERED SASINE.—1. *Effect of the charter before infeftment.*—The feudal relation between superior and vassal is, according to our modern notions, of the nature of a concluded agreement, whether constituted in the proper form of a charter, or that of a feu-contract. The latter, except as giving the parties the privilege of personal diligence for enforcing its provisions, in virtue of the

clause of registration which it contains, is in no respect more binding than the charter (*a*). (1.) In questions, therefore, between the contracting parties and their heirs, the clauses of the charter become obligatory on its delivery to and acceptance by the vassal. Nor is this effect confined to the individual named in the deed as vassal, and his heirs. Charters are generally conceived in favour, not only of the vassal and his heirs, but also of his assignees, by whom are meant disponees before infeftment (*b*); but although not thus conceived, they may be assigned unless the vassal is restrained; (above, § 46). And as assignees may be either voluntary or legal, the obligations on the vassal are prestable by one who accepts a conveyance before infeftment, or, in other words, so long as the grant remains a mere personal right, and that whether he be an onerous or gratuitous assignee, or legal, by adjudication or judicial purchase (*c*). A party in any of these characters takes the right as it stands in the person of the vassal, and does not trust to the register. (2.) Whatever restrictions, therefore, have been imposed on the vassal, although contrary to the natural characters of the feudal relation, are valid in questions not merely with the vassal and his heirs, but also his assignees, voluntary or legal, so long as the right continues personal. Until infeftment, it does not acquire the character of a fee. (3.) But, on the other hand, clauses contrary to the qualities of the feudal relation, conceived in favour of the vassal, are not binding on the singular successors of the superior, until infeftment upon the charter has made them real burdens on the right of superiority. Before infeftment, the vassal trusts to the warrandice in the charter, which is personal only.

2. *Effect of the registered sasine upon the feudal grant.* —(1.) Infeftment duly completed by a registered sasine is therefore essential in a question with the disponees or adjudging creditors of the superior, for, as the first registered sasine is preferred, the right of the vassal continues defeasible until it has been thus protected. A party holding a conveyance, whether with or without proper feudal or executive clauses, has a mere personal right or *jus ad rem*, which he can make real by infeftment only, evidenced by a duly registered sasine.

Such infeftment proceeds, in the ordinary case, on the feudal clauses of the conveyance, and where it contains none, by means of adjudication in implement. But until the personal right is made real, or *jus in re*, the holder has a mere faculty for completing a feudal right; and as the feudal right is the ultimate test of preference, he may thus be excluded by the prior diligence of adjudging creditors, or the fraud of the superior or disponer in granting a second conveyance. (2.) It is likewise settled law, that no permanent real burden can be created on land without infeftment (*d*). Not only, therefore, is a registered sasine necessary to complete the vassal's right, but every restriction on the natural properties of the fee must be expressed in the sasine, and enter the register, in order to attach to the subject when transmitted to third parties. Thus, under the general terms *parts and pertinents*, all rights and privileges connected with land, except the *regalia*, being included, it has been seen that a special reservation is necessary to withdraw from the conveyance any portion of the subject, such as mines and minerals; (above, § 48); but it is essential to keep in view, that such reservation, although expressed in due and proper form in the charter or feu-contract, is, after infeftment, ineffectual against the singular successors and creditors of the vassal, unless it has been transferred to the sasine and the register. On the other hand, the renunciation by the superior of the casualties of superiority will not affect his singular successors or creditors, unless in like manner inserted in the sasine (*e*). The result is thus produced by the charter and sasine combined, for the latter, without its warrant, is not more effectual to create a real right than the charter without a registered sasine (*f*). (3.) In practice, the course followed is to express restrictions and relaxations in the dispositive clause, and to refer to them in the precept of sasine; but this affords no security to the superior that they shall enter the sasine. It is desirable that some fixed rule in this important matter should be introduced for the guidance of the conveyancer.

(*a*) Hunter, 16th Dec. 1834, F. C., 13 S. 205.

(*b*) Magistrates of Inverness, 2d Feb. 1769, M. 15,059.

(*c*) Boyd, 22d Jan. 1766, B. S. 5. 919; Preston, 6th March 1805, M.

App. *Pers. and Real*, 2. In the case of Preston, the question occurred, if creditors could acquire a subject, the right to which (by disposition) continued personal in the debtor, free of a right of pre-emption constituted by back-bond in favour of the debtor's author. The Court having, in a prior action at the instance of the disponer, found, that the tenor of the back-bond and obligation ought to be inserted in all the subsequent titles and investitures of the subject, whereby the personal right in the debtor, as disponee, was connected with the qualifying obligation, it was held that the creditors could only attach the subject, as thus qualified with the right of pre-emption.

(*d*) Ersk. 2. 3. 51.

(*e*) Ersk. 2. 3. 48.

(*f*) See Allan, 19th July 1780, M. 10,265.

TITLE V.—GRANTS OF SERVITUDES.

85. SERVITUDES POSITIVE AND NEGATIVE.—Servitudes, as restrictions on feudal rights, demand some notice. They are either positive or negative. (1.) Servitudes are *positive*, which entitle the proprietor of the subject to which they attach, called the *dominant tenement*, to exercise certain rights and privileges, such as pasturage, watering of cattle, &c., over the *servient tenement* or subject burdened with the right. (2.) Those servitudes, again, are *negative*, whereby the proprietor of the servient tenement is excluded from some use or enjoyment natural to the subject, such as the erection of buildings, or planting of trees, or the raising of buildings or allowing trees to grow beyond a certain height, so as to obstruct light or prospect. (3.) Servitudes, whether positive or negative, as regards number and kind, are clearly defined by law, and new ones cannot be created; as regards degree, they are strictly interpreted. (4.) Rights or restrictions, not proper servitudes, constituted by private agreement, depend for their force upon personal contract, and are ineffectual against singular successors, unless capable of being feudalised, and actually made real or feudal rights; and even servitudes by grant do not burden the right of the superior acquiring the property by a feudal forfeiture, but those only which are constituted by prescription.

(*a*) Ersk. 2. 9. 2. *et seq.*; Bell's Princ. 979, and authorities cited.

86. POSITIVE SERVITUDES.—These consist of *pasturage*,

feal and divot, way or passage, water, aqueduct, support, &c. (1.) Positive servitudes by grant seem to obey the rule which applies to the constitution of proper feudal rights, that the granter's title, if not made up at the date of the deed, must afterwards be completed in order that the grant may be validated as against third parties by accretion (*a*). (2.) Constitution by grant may be in the form of a separate deed, or by means of a clause inserted in the titles of either the dominant or servient tenement; but to render the servitude effectual in questions with singular successors, it must either be followed with possession, or duly feudalised by means of a separate registered sasine or insertion in the sasine following on the conveyance in which the grant has been incorporated. Infeftment, therefore, is not essential to the constitution of a servitude, although circumstances may render it advisable to feudalise the right (*b*). (3.) The terms of constitution ought to be precise. There are, however, no technical words essential to be employed. Terms, such as the following, viz. *An heritable and irredeemable right, servitude and attolerance of pasturing horses, cattle and bestial, on (or digging, winning and driving fuel, feal and divot from) the moor of , lying in the parish of , and shire of , with sufficient roads and passages to and from the same*, are proper and customary. The variations required by the nature of the servitude are simple. (4.) Registration in the register of sasines, when the grant is not completed by infeftment, is customary, although not essential.

(*a*) Stair, 4. 17. 6. See Sivright, 19th Dec. 1828, F. C., 7 S. 210.

(*b*) Stair, 2. 7. 1. *et seq.*; Erak. 2. 9. 3-4; Bell's Princ. 990-2; Jur. Styles, 1. 63.

87. NEGATIVE SERVITUDES.—Rights of this nature, consisting in restraint, are incapable of possession in the proper sense of the term, and thus of being either acquired or lost by prescription. (1.) They are constituted by grant, which, as in the case of positive servitudes, may be in the form of a separate deed, or by insertion in the title-deeds of either the dominant or servient tenement, without sasine and registration (*a*). A preliminary writ, such as articles of roup, is competent for the

purpose, if not superseded by a subsequent conveyance (*b*). More care is necessary in constituting a negative than a positive servitude: the latter is perfected by possession, of which the former is incapable. Thus, an obligation in a preliminary deed, such as a minute of sale, to introduce the declaration of a servitude *altius non tollendi*, in the future perfect deed of conveyance of the subjects, has been held to be discharged by the acceptance of a disposition not containing the stipulated declaration (*c*). (2.) It follows that any mode of constitution, less formal than by written declaration or agreement, such as the exhibition of a plan which indicates buildings of a certain height and structure, is ineffectual against a vassal or disponee (*d*). Nor will mere tolerance without restrictive words confer a servitude of light or prospect (*e*). (3.) The terms of constitution must be precise; such, for example, as, *To keep and maintain the ground and space above described an open area in all time to come, for the preservation of the lights and prospect of the tenement, likewise above described, belonging to the said B.; and I, the said A. and my foresaids, are hereby restrained from erecting any building, or planting trees therein, or raising any other obstruction to the said lights and prospect, (or above a certain height, according to the agreement of parties.)* (4.) Where the constitution is by a separate and distinct deed or *bond of servitude* (*f*), and not in a mere preliminary writ, it is not essential, although advisable, to repeat the restriction in the subsequent titles and thereby make it a real burden, or to record the deed in the register of sasines. Sasine may however competently pass upon the deed, which, for that end, will contain the proper feudal clauses.

(*a*) Erak. 2. 9. 2. *et seq.*; Stair, as above; Bell's Pr. 979, and auth. cit.

(*b*) Cockburn, 1st July 1825, 4 S. 128, and H. of L. 2 W. S. 293. See Pollock, 16th Jan. 1827, F. C., 5 S. 195.

(*c*) Sivright, 19th Dec. 1828, F. C., 7 S. 210.

(*d*) Gordon, 11th March 1814, reported in note to Young and Co., 17th Nov. 1814, F. C., affirmed, 6 Dow, 87; Walker, 11th March 1825, F. C., 3 S. 650.

(*e*) Morris, 19th Feb. 1830, F. C., 8 S. 564.

(*f*) 1 Jurid. Styles, 65.

88. THIRLAGE.—This agricultural tax is usually ranked

amongst servitudes, although, according to our latest authority, it does not strictly belong to that class of burdens. Thirlage still extensively exists, but is gradually being extinguished by the operation of the statute, which sanctions its commutation into an annual payment (*a*). The constitution of thirlage by deed may now be regarded as obsolete (*b*).

(*a*) 39 Geo. III. c. 55.
(*b*) See Ersk. 2. 9. 18, *et seq.*; Bell's Princ. 1017, *et seq.*

89. COMMONTY.—1. *Nature of the right.*—The right of commonty is usually classed among servitudes, although truly one of property, and thus differing from the servitude of pasturage, or of fuel, feal and divot. (1.) Rights of servitude are necessarily co-existent with rights of property. When, of two proprietors of adjoining subjects, having a clause in their title-deeds of *parts and pertinents*, or the privileges of barony, one has had full possession of a separate subject, and the possession by the other of the same subject has been limited to particular acts which fall short of the common and ordinary use of the subject, the right of the latter amounts to a servitude only, whereas that of the former is a right of property. The acts of possession exercised by the parties are therefore essential to the determination of the question of right. Thus, the use of pasturage only is not exclusive of the notion of property in wild and uncultivated land, although another may have opened mines of coal, &c.; it is the natural use of the subject; but the exercise of tillage by one, and of pasturage only by another, excludes the idea of property in the latter, whose right is merely one of servitude. (2.) This rule may apply to the rights of a number of parties in the same subject, one or more having rights of property and others of servitude, which, as exercised over one and the same subject, make it *common property* or *commonty* (*a*).

2. *Constitution.*—(1.) In the circumstances stated above, (Art. 1.), the rights of the parties were assumed to be explained solely by the state of possession, the titles of both being of the same import,—with parts and pertinents. But a right of property in a common, as contradistinguished from a servitude, may be constituted by express grant, to which

the grantee's possession is referable (*b*). Thus a conveyance of lands *cum communio*,—with commonty, confers a right of property. The like interpretation is given to other terms clearly denoting a right in the soil, and not a mere interest in the surface, such as, *with shealings and gleanings*, or with *gleanings, grazings and shealings*; whereas the terms, *common pasturage; privilege of commonty; pasturage of cattle, and privilege of commonty; parts, pendicles and pertinents, with privilege of shealing*, and the like, import a right of servitude only (*c*). (2.) To give an immediate right, the grant must necessarily flow from the proprietor of the barony or estate to which the common pertains; but a grant *a non domino*, is a good prescriptive title. (See *Seller's Title.*)

3. *Division.*—Commonties (with the exception of those belonging to the Crown and to royal burghs) may be divided under a judicial process, by a commissioner appointed by the Court of Session, who is usually the Sheriff-substitute of the shire where the lands are situated. (1.) The *title* necessary to ground the action is one of property, not of servitude merely, and there must be two joint proprietors, (not servitude-men,) at the least: the number or extent of rights of servitude does not affect the question (*d*). (2.) The *rule of division* among proprietors is the valued rent of their respective estates, even although part of the valuation should belong to a mill (*e*). In a question between proprietors and feuars having a servitude of pasturage, the latter have a claim to so much of the common as will pasture the number of cattle which they have been in use to graze on it, or, in the general division, they may have their rights of servitude valued, and a portion of the common subject allotted in lieu of them (*f*); but mere servitude-men cannot insist against the proprietor of that share of a common subject which is declared to form their servient tenement, for a division of such share, and thus convert a right of servitude into a right of property (*g*). (3.) *Exceptions* may occur to the rule of division. Thus, where lands have no valued rent, as in Zetland, the division is made on the data according to which the cess is levied (*h*). The state of possession of a moss, and the manner in which it marches with the lands of the claimants, have been admitted to control the ordinary rule. The division

was in one instance made, so that the boundaries of the property of the several heritors were "fixed according to the extent of their respective lands lying along the front of the moss to the centre thereof (*i*)."

(*a*) Stair, 2. 7. 14; Ersk. 2. 6. 3; Johnston, 30th July 1768, M. 2481. See Watt, 10th Nov. 1813, 2 Dow, 25.

(*b*) E. Fife's Trustees, 25th Jan. 1831, 9 S. 336.

(*c*) Ersk. 3. 3. 57; Bell's Pr. 1089; Rattray, 27th Nov. 1724, M. 2463; Lawrie, 21st Feb. 1771, M. App. *Commonty*, 2, and note to D. Buccleuch, 16th June 1812, F. C.; E. Airlie, 11th March 1835, 13 S. 691.

(*d*) 1695, c. 38; Ersk. 3. 3. 57; Bell's Pr. 1092-3; Stewart, 21st Dec. 1739 and 1st Feb. 1740, M. 2469; Laurie, as above; Gall, 31st May 1810, F. C.

(*e*) 1695, c. 38; Ersk. 3. 3. 58; D. Queensberry, 22d Jan. 1771, M. App. *Commonty*, 1; Small, 10th Feb. 1804, M. App. *Commonty*, 3.

(*f*) Maitland, 11th Aug. 1772, M. 2485; E. Wigton, 1st Feb. 1739, M. 2467, Elch. *Commonty*, 2.

(*g*) Laurie, as above.

(*h*) Bruce, 11th Dec. 1823, 2 S. 573.

(*i*) Campbell, 17th May 1804, M. App. *Commonty*, 4.

CHAPTER III.

ABSOLUTE CONVEYANCES *INTER VIVOS.*

TITLE I. HISTORY OF THE DISPOSITION OF SALE.

90. DEEDS OF TRANSMISSION.—A vassal may transmit his right either to heirs, who are called universal successors, and take *ipso jure* upon his death; or by an express conveyance to have effect during his lifetime, to another person alive, or *mortis causa*, to take effect on his death. Conveyances *inter vivos* are voluntary—by disposition or bond; and necessary or judicial—by adjudication. In the former the disponee, or person acquiring the right, is called a singular successor or lender; in the latter, a creditor-adjudger. Conveyances *inter vivos* are likewise classed into absolute conveyances or deeds of alienation, and redeemable, or deeds or rights in security. It is under this latter division that the subject will be considered.

91. EARLY MODES OF TRANSMISSION.—At an early period of our history, the alienation of land without the consent of the superior, was, in accordance with the written feudal constitutions, forbidden to the vassal (*a*). But, as sub-infeudation was permitted (*b*), this form of conveyance came to be extensively used, notwithstanding that a subaltern right was exposed to the casualties and forfeitures incurred by the subvassal's immediate superior, unless acknowledged by the confirmation of the overlord. Confirmation of this sort is not, however, to be confounded with that species of confirmation to be afterwards noticed, employed to complete the entry of a disponee. Its chief advantage was to save the right of the subvassal, when the fee of the immediate vassal fell to the superior by the casualty of recognition, in which event the subvassal whose right had been acknowledged took the place

of his own immediate superior. Subaltern infeftments, granted by the great vassals of the Crown or tenants *in capite*, who conferred them openly in the courts of their jurisdictions, were originally called *public;* and those again which flowed from their vassals, *base*, (as being of a lower description,) or *private*, terms of which the import is now much altered. These base rights, we are told, increased greatly in consequence of a law (*c*) which forfeited the fee of any freeholder who should alienate so large a portion of his lands as to leave what was insufficient for the due performance of the services exigible by the superior, unless he had the superior's consent to or confirmation of the alienation. This law was probably evaded on the plea that sub-infeudation was not an alienation; and the multiplication of intermediate fees, to the great inconvenience of the barons, who thus lost sight of those liable in performance of the feudal services, may have been the cause of the statute of Robert I., if such a law was truly enacted by the Scottish Parliament (*d*). That act (*e*) is said to have been borrowed from the statute of Edward I. of England, known by its introductory words, *Quia emptores terrarum*, which abolished sub-infeudation, and by force of law constituted the disponee upon infeftment, the vassal of his author's superior. It is accordingly to this statute of Robert that we are told to ascribe the origin of the charter *a me de superiore meo* (*f*), so well fitted to carry into effect the principle of the enactment; since the holding, as the terms import, was to be of the granter's superior; but superiors, unwilling to relinquish the forms of feudal supremacy, required that all transmissions of the fee should receive express confirmation from them; and as practice often makes or modifies the law, this confirmation came to be regarded as indispensable.

(*a*) F. 2. 52-55; stat. 31. of Will. Lion.

(*b*) F. 2. 34, § 2.

(*c*) Stat. 31. Will. above.

(*d*) Stat. Rob. I. (1325,) c. 24. *Item*, For sa meikle as divers and sundry men be buying of lands and tenements pertaining to knights and other lords, to their great hurt and prejudice in time bygane hes entered the samine the quhilks lands were sauld and annalzied be the tenants and freehaulders of the saidis knights and uthers great men and lords to be halden as of their fee of themselves and their heirs and not of the saids knights and lords being overlords of

the annalziers makers of the said alienation and infeftments whereby the said overlords did tyne and amit the marriages escheats and wards quhilk did fall and pertain to them of their tenandries the quhilk was hard and prejudicial to them. It was therefore STATUTE and ORDAINED 2. That in time coming it sall be lesome to any free man to sell his lands at his awne pleasure and will swa that the buyer of the lands sall hald the samine conteined in his infeftment immediately of him quha is overlord to the seller of the lands for the samine service and dewties as the maker of the infeftment and alienation did hald them before the making thereof. 3. And gif any man sells and disponis ane part and portion of the lands or tenements the buyer quha is infeft sall hald the samine part of the immediate overlord. 4. And he sall be burdened and charged incontinent with sa meikle service as may pertein to that part conform to the quantitie of the land and tenement quhilk is sauld. 5. And swa in this case ane part of the service sall be paid and done by him quha is infeft to the overlord, according to the quantitie of the tenement quhilk is sauld. *Reg. Majestatem*, pp. 364-5, edit. 1774. See Bell's Conv. of Land, 3d ed. App.

(*e*) Ross, 2. 256; Jur. Styles, 1. p. 82.

(*f*) Ross, 2. 257.

92. INTRODUCTION OF THE DOUBLE CHARTER. — The situation of a purchaser became, from the necessity of obtaining the superior's confirmation, equally hazardous as if the statute of Robert I. had not been enacted; and so completely was that law disregarded, that an act passed in the reign of David II. (*a*) which prohibited alienations by the Crown vassals, "*absque ipsius regis speciali licentia;*" and by a subsequent statute (*b*), alienation without previous licence was declared to be a ground of recognition or forfeiture of the fee. Still, although this act was extended to sub-infeudation, the penalty was not incurred unless the vassal alienated the *maist part* of the lands (*c*); and confirmation by the superior, after the alienation, became equivalent to previous licence. By a statute of James II. (*d*), the setting of lands in feu-farm was made lawful to the great barons, and excluded the casualties of the Crown; and although this law was at a later period repealed, it would appear that much encouragement had thereby been given to sub-infeudation; but subaltern infeftments in portions not exceeding the half of the vassal's fee continued to be valid (*e*). In this situation, purchasers having no means of enforcing an entry with the seller's superior, resorted to the form of sub-infeudation, and besides obtaining a charter *a me*, in the hope of afterwards obtaining the superior's confirmation, they got an immediate title

by means of a charter *de me*, (a grant to be holden of the seller,) containing an elusory reddendo of a penny money or the like. This latter infeftment being merely subaltern, the purchaser was consequently subject to all the inconveniences attending the intervention of a superior between him and the overlord. But it gave a right to the property, which could not be defeated by a subsequent infeftment. The infeftments upon these two charters were combined in one sasine (*f*).

(*a*) Stat. David II. c. 24.
(*b*) Stat. Rob. III. (1400,) c. 19.
(*c*) Balfour, *Recognition*, c. 10.
(*d*) 1457, c. 71. See 1503, c. 90 and 91; Ersk. 2. 5. 7.
(*e*) Stair, 2. 11. 15.
(*f*) See M. *voce Confirmation.*

93. STATUTE OF 1469 (*a*) ANENT APPRISERS.—A statute, passed for enabling apprisers, or creditors affecting the lands of their debtors by means of the diligence of apprising, to obtain an entry from the superior, proved the means of undermining the feudal power of the aristocracy, and gradually introducing a free commerce in land property. By this enactment a creditor-appriser is entitled to an entry from his debtor's superior, on paying *a year's maill as the land is set for the time;* and as superiors had no title to examine the grounds of the debt on which the diligence proceeded, vassals were not slow to avail themselves of the advantage which the statute conferred, in enabling them indirectly to give a secure title to a purchaser. The seller granted an obligation of debt to the purchaser, upon which he apprised the lands, and thus became legally entitled to an entry, on the terms prescribed by the enactment (*b*). An exception from the ordinary rule at the same time received practical effect in transacting with the Crown (*c*). Purchasers from an immediate vassal of the Sovereign received an entry on payment of a composition to the Treasury, which has for a long period been fixed at a sixth part of the valued rent (without respect to the amount of the actual rental) of the lands. It is also probable that wadsets were at one period employed to give a title to a purchaser under the cover of a redeemable right. (See *Wadset.*)

(*a*) 1469, c. 36. *(Excerpt.)* " And als the overlord sall receive the creditor " or ony other buyer tennent till him payand to the overlord a zeires maill as the " land is set for the time. And failzieing thereof that he take the said land till " himselfe and under-gang the debtes.

(*b*) Ersk. 2. 7. 6.

(*c*) Ersk. as above.

94. PUBLIC AND PRIVATE RIGHTS.—Notwithstanding the means afforded by the statute of 1469 for indirectly obtaining an entry with the superior, sub-infeudation necessarily continued to prevail, for an appriser behoved to pay a year's rent of the lands, which of itself operated as a check to the free transmission of property; and the facility with which base or subaltern rights might be created became the source of a great evil. Infeftments, whether confirmed by the superior or merely subaltern, being at that early period preferable according to their dates, those even who had paid an adequate price for land often found themselves excluded by rights granted to children or confident persons. An act (*a*) was accordingly passed for validating the rights of onerous disponees obtaining peaceable possession of the lands, and retaining it for a year and a day, in competition with persons *put in private state thereof, not by resignation in the hands of the Crown, nor by confirmation with precept from the Chancery, nor by resignation in the hands of the overlord, or his confirmation.* The statute received a liberal interpretation, and the Court went even beyond its provisions, by sustaining a public infeftment although posterior to a private, where neither had been followed by possession. The terms of this enactment, and the manner in which it was interpreted, serve to explain the meaning of the words *public*, and *private* or *base*, as applied to infeftments; and this is farther illustrated by a passage in Stair (*b*), where he says, " Infeftments were esteemed pri- " vate, latent and simulate, *retenta possessione*, when the person " infeft was not put in possession, the infeftment passing only " between the disponer and the person infeft; but if the in- " feftment did proceed from the disponer's superior by resig- " nation or confirmation, then the presumption of simulation " for want of possession ceaseth, because superiors use not to " grant such infeftments but upon compositions. And there-

"fore, infeftments granted by the disponer's superior were "called public infeftments, and were effectual from their dates; "but the private or base infeftments were not effectual till "the presumption of simulation ceased, either by natural "possession, or by uplifting maills and duties, or by processes "for obtaining these duties." It is obvious from this quotation, and another passage in the same author (*c*), that infeftments, although originally styled public or private, as they flowed from a superior higher or lower in the feudal chain, more generally received these distinctions according as they were completed openly, by means of the interposition of the overlord, or in a covert manner between the granter and receiver. The term *base* is indeed employed by that author as synonymous with *ignoble;* but its application seems generally to have been to private or simulate infeftments. For these reasons, it has not been used under a former head of this work. It manifestly does not now apply to subaltern rights, however low in the scale, when proper feudal grants; and indeed, in modern feudal language, it seems to have lost all other meaning than as denoting an infeftment upon the indefinite precept in the disposition of sale prior to confirmation. The protection thus given to infeftments followed by possession did not, however, remove the legal difficulty of obtaining an entry from the superior. A subaltern right, although good against the granter, and also against third parties when followed by possession, did not protect against the casualties of superiority falling in the person of the seller, and infeftment on the charter *a me* left the purchaser exposed to the caprice of the superior. This state of the purchaser's title continued until the establishment of the registers; and although it was not until upwards of a century afterwards placed on its present footing, an important change then took place in the form of the conveyance.

(*a*) 1540, c. 105.
(*b*) Stair, App. 2.
(*c*) Stair, 2. 3. 27.

95. ENTRY BY RESIGNATION.—Before adverting to the effect produced upon the purchaser's title by the establish-

ment of the registers, it is necessary to notice the form of entry by resignation. It has been stated, (above, § 28,) that resignation by the symbol of a rod or baton was practised among the Romans, and was borrowed from their forms by the nations who overran the Empire, and established the feudal system. Resignation is, according to the feudal law, the rendering back the fee to the superior; and, when the vassal gave up his right absolutely to the superior, the form was by an unqualified resignation, or, as we style it, *ad remanentiam*. But, as the transmission of the fee to a purchaser or other disponee, was not valid without the superior's sanction, (for sub-infeudation, although an alienation, is not a transmission,) the superior might refuse a resignation qualified with the condition of his investing another with the fee, styled *in favorem*: it was therefore advisable that his consent to this sort of conveyance should in the first instance be obtained. The ceremony was then performed in presence of the superior, but not necessarily upon the ground of the lands; and after receiving the symbol, he delivered it to the new vassal or his attorney, in presence of a notary and witnesses. A notarial instrument upon the fact was made out, and on this evidence the new vassal might obtain letters of horning for charging a refractory superior to give him a charter upon the resignation (*a*). The entry by resignation is the genuine feudal form of transmission, but, as being dependent on the will of the superior until a comparatively recent period, it was rarely adopted excepting in the entry with the Crown. It gave no means, therefore, to a purchaser of obtaining a title which he did not possess in the charter *a me*, and was even a less summary mode of getting an entry when the superior had been bargained with for his consent to the transmission; for resignation is completed by charter and sasine, whereas infeftment on a charter *a me* is at once validated by the superior's confirmation.

(*a*) Craig, 2. 2. 10; Mack. 2. 7. 17; Erak. 2. 7. 23; Lord Braco, 22d Feb. 1741, M. 6919.

96. UNION OF THE TWO CHARTERS AND THE PROCURATORY OF RESIGNATION.—At the beginning of the seventeenth

century, the entry of a purchaser must thus have been by resignation *in favorem* consented to by the superior, or by infeftment on a charter *a me* confirmed by him; or if the superior refused to receive the purchaser as his vassal, it behoved the purchaser either to accept of a subaltern right from the seller, or to comprise the lands for a fictitious claim of debt, and charge the superior to receive him under the provisions of the act of 1469. The delay thus so often caused in obtaining a public right increased the facilities for the fraudulent private or base infeftments to which allusion has been made, at the same time that the preference given to a posterior public right, in competition with a subaltern infeftment not followed by possession, tended on the other hand to render subaltern rights insecure, even when obtained *in optima fide*. The test of possession likewise was of a highly inconvenient nature, and subjected the best founded rights to the doubtful result of parole testimony. It was full time, therefore, for the introduction of a surer rule of preference; and such would have been the result of the statute of 1617 (*a*), establishing the registers, which necessarily took away the character of private or simulate from all infeftments duly registered, had full effect been given to its provisions. But the old mode of deciding preferences by the test of possession was for some time followed, under the modification that *civil* possession, by drawing the rents, or an action to obtain it, came to be sustained in place of the *actual* possession of the lands (*b*). By this means the evils produced by litigation were increased (*c*). In this state of the law, purchasers put themselves in a situation to resort to any of the known legal modes of investiture, which might, in the circumstances, be effectual to secure their purchase; and with that view they took the sellers bound in a formal contract of sale, to grant, on the demand of the purchaser, all necessary deeds, including the charters *a me* and *de me*. This form of a contract would seem to have been adopted, from the notion that a charter or disposition, until followed by infeftment, imported only a naked paction, and not an obligation which could produce action against the granter or his heirs (*d*). After obtaining and taking infeftment on the two charters, which, except as regarded the

holding, were in similar terms, and thus completing the *title*, the purchaser brought an action of maills and duties against the tenants, which was equivalent to *possession*; and when he succeeded in obtaining the superior's consent to receive him in place of the seller, confirmation made the right public, and evacuated the subaltern infeftment. But if either of the infeftments was set aside, he might defend himself upon the other (*e*). On the other hand, when the superior had from the beginning consented to receive the purchaser, the entry was at once by resignation, upon the procuratory of the seller. It was perceived that these various deeds did not necessarily require separate forms. The progress of the system of registration gradually produced confidence, and the happy notion occurred, of combining an obligation to infeft by the two manners of holding *a me* and *de me*, with a precept of sasine in indefinite terms, and a procuratory of resignation, in one writ, which, as purchasers now readily paid the price on the security of the registers, assumed the unilateral form of the disposition.

(*a*) 1617, c. 16, above, page 121.
(*b*) Ersk. 2. 7. 12; Stair, App. § 2.
(*c*) Stair, as above.
(*d*) Craig, 2. 4. 20.
(*e*) Stair, App. § 1.

97. MODERN FORM OF THE DISPOSITION.—The union in a single deed of the two modes of infeftment having been subjected to the test of discussion, it was held that the sasine being applicable to both or either of the infeftments *a me vel de me*, the application made by the superior's confirmation determined the nature of the right, and perfected the sasine *a me* from its date (*a*). The precept in the disposition being thus adapted to an obligation to infeft, which referred at first to an alternative mode of holding, received the name of the *indefinite precept*; but the holding was uncertain only as regarded the mere form of the title; the security of the purchaser became complete from the date of the registration of the sasine. For, by a legal fiction, the infeftment, although capable of being made public by the confirmation of the overlord, or seller's superior, was considered in the mean time to be base

or subaltern, as held of the seller himself. Still the purchaser was exposed to many inconveniences; but these were gradually removed by the Legislature. Procuratories of resignation and precepts of sasine, which, as mandates, expired on the death of the granter or disponee, were made permanent (*b*); real rights were declared absolutely preferable, according to the date and priority of the registration of the sasines, without regard to the distinction of public and private infeftments, "or of being clad with possession, or not clad with possession" (*c*); and thus the great principle of civil possession was permanently established on the registers. The privilege introduced by the statute of 1469, in favour of apprisers, was likewise, in practice, extended to disponees, an obligation in the disposition to give the purchaser a valid infeftment being sustained as a title to adjudge the subject in implement of that obligation. This latter form appears to have been at first effectual against the superior without the offer of a year's rent (*d*); but adjudications in implement and *contra hæreditatem jacentem* were placed on the same footing, in regard to the superior, with apprisings for debt, some years prior to the period at which these last were superseded by the modern form of adjudication (*e*). By these improvements on our feudal forms, the right of superiors absolutely to refuse an entry being taken away, they readily conceded in practice what they had no interest to withhold, and their power capriciously to subject a purchaser to the inconvenience of an adjudication came likewise to be removed by statute. A purchaser producing a disposition containing a procuratory of resignation may now, upon a tender of all legal demands, compel the superior by means of personal diligence, to receive resignation and grant infeftment in his favour (*f*). The composition payable by a voluntary disponee has, from the analogy of the statute in favour of adjudgers, been fixed by the Court at a year's rent of the subject, under certain deductions (*g*). See *Charter of Confirmation.*

(*a*) Ersk. 2. 7. 16; B. of Aberdeen, 15th July 1680, M. 3011; Bothwell, June 1687, M. 3012; L. Chancellor, 15th Feb. 1688, M. 3012.

(*b*) 1693, c. 35; above, p. 100.

(*c*) 1693, c. 13; above, p. 125.

(*d*) Stair, 3. 2. 53; 4. 51. 9; Ersk. 2. 12. 50.

(*e*) 1669, c. 18.

(*f*) 20 Geo. II. c. 20, § 12.

(*g*) See, with reference to the history of the disposition, Jurid. Styles, 1. p. 79, and foll.

TITLE II. MISSIVES OF SALE.

98. OFFER AND ACCEPTANCE.—The causes which contributed to produce the present form of the disposition of sale having in a general way been explained, it is proper, before considering the application of that deed to practice, to notice those forms which usually precede its execution. The minute of sale is the ordinary form of expressing the agreement of parties when the transaction is by private bargain. It is prepared with care, and is much to be preferred to the loose mode by missive letters (*a*), which, from the ignorance of parties of the legal import of the terms employed, frequently give rise to tedious discussion, if not to expensive litigation. But with respect to missives, it may be observed generally, that when a written offer is made, it will continue binding on the maker, unless restricted to a particular period, until withdrawn; that a qualified acceptance is not binding on the offerer until he shall have consented to the new condition; and that an offer can only be withdrawn by a writing equally formal as the offer. When missives are employed, they ought, on both sides, to be holograph, or formally attested.

(*a*) See Jurid. Styles, 1. 87.

TITLE III. MINUTE OF SALE.

99. NATURE AND OBJECT.—The minute of sale (*a*) is expedient when the seller is not in a condition to grant an immediate conveyance; *e. g.* in the case of burdens affecting the subject which must be cleared before a disposition is accepted. But where it is unencumbered, and the parties understand each other, this preliminary deed is plainly superfluous.

(*a*) Jurid. Styles, 1. 88.

100. OBLIGATIONS ON THE SELLER.—The minute of sale

being employed to record the agreement of parties preliminary to the actual transmission of the property, the obligations of the seller are first in order.

101. OBLIGATION TO GRANT A DISPOSITION (*a*).—(1.) The seller in the first place becomes bound to deliver a valid disposition of the lands on receiving payment of, or security for, the stipulated price. In the Juridical Styles (*b*), this form is recommended as preferable to a *de præsenti* conveyance; and assuming that it contained a binding agreement, it would be a convenient mode of interim arrangement. It is thought, however, that a minute of sale must, to be obligatory on the parties, contain, from its very nature and purpose, an express declaration of an agreement, which either may enforce if ready to implement his own side of it. The form in the Style-book, in the author's humble opinion, would not authorise a valid charge for implement at the instance either of the seller or purchaser, as it does not contain a specific term of implement. He would venture to suggest, that the clause should express a prior agreement between the parties to be implemented by the seller delivering a disposition, and the purchaser paying or finding security for the price, *simul et semel*,—at one and the same term to be specified in the clause, and that they should mutually bind themselves accordingly. There appears to be no real danger to the seller in acknowledging an express agreement, if qualified with a declaration that its implement is conditional on payment of the price at the specified term (*c*), since, so long as the right continues personal, it must pass with all its conditions to an assignee or adjudger. It would indeed appear, that if the disposition remains undelivered, and is retained by the seller in security of the price, he is preferable to the creditors of the purchaser, on the principle that the property is not transferred until the price is paid or the security of the purchaser accepted in lieu of it (*d*). (2.) Where the obligation bears to deliver a disposition *betwixt and a certain term*, the term-day is included (*e*).

(*a*) It is CONTRACTED and AGREED between A., heritable proprietor of the lands, teinds and others after mentioned, on the one part, and B. on the other part, in manner and to the effect following: That is to say, the said A., in consideration of the price after stipulated, has agreed, and hereby BINDS and OBLIGES

himself, and his heirs and successors whatsoever, at the term of next to come, and upon receiving payment of, or sufficient security for the said price, as after specified, to execute and deliver, upon the proper charges and expenses of the said A., (*or otherwise as may be agreed on,*) a valid and sufficient disposition to and in favour of the said B., and his heirs and assignees, of ALL and WHOLE *(describe the lands from the title-deeds,)* and which disposition shall contain an obligation to infeft *a me vel de me*, procuratory of resignation, clause of absolute warrandice, with the exception of the current tacks or minutes of tack, and feu and blench rights, assignation to the writs and evidents and maills and duties, precept of sasine, and all other usual and necessary clauses.

(*b*) Jurid. Styles, 1. 90.

(*c*) Stair, 1. 14. 4; Young, 9th March 1785, M. 14,191.

(*d*) Baird, August 1758, M. 14,156.

(*e*) Pet. of Advocates, 26th Jan. 1675, M. 345; Cockburn, 31st Jan. 1724, M. 640, and 2269.

102. OBLIGATION TO DELIVER A VALID PROGRESS (*a*).—1. *Distinction between right and title.*—By a *progress*, is understood the chain of title-deeds by which a person holds his lands. Questions arising upon the obligation to deliver a sufficient *title* are not to be mixed up with those relating to the seller's *right* to the subject sold. If the latter be not radically bad, the sale is effectual, and the question of title resolves in the general case, and where there is no undue delay on the part of the seller, into one of expense merely (*b*).

2. *Questions in regard to the seller's right.*—The seller's right to the subject must be clear and undoubted: the purchaser is not bound to discuss doubtful questions with third parties, or even to subject himself to the risk of litigation. (1.) For example, he may reject a title originally limited or defective, although apparently defensible on prescription, as not conferring a valid right, since the course of the prescription may have been interrupted, unless interruption, owing to the great lapse of time, is plainly urged for the mere purpose of delay. Nor is it a good answer, that the seller absolutely warrants the subject (*c*). (2.) In like manner, where the lands do not belong in fee-simple to the seller, he cannot force a purchaser to implement a bargain made on that footing, and thus expose himself to the risk of challenge by substitutes of entail, although the seller may have grounds for maintaining that he can legally defeat their right (*d*). (3.) When the objection is of a nature to be determined by the Court as

between the seller and purchaser, a judgment may be obtained in a suspension by the latter, of a threatened charge on the minute of sale or articles of roup (*e*).

3. *Questions in regard to the title.*—(1.) A seller whose right is undoubted, must nevertheless deliver a sufficient legal title and progress, or supply defects at his own expense, unless parties shall stipulate to the contrary; an obligation which is likewise incumbent on a trustee (*f*). In order to avoid controversy, one of two modes may be adopted; a reference in the minute of sale to an arbiter, who ought to be named (*g*), or a prior examination of the title-deeds by the intending purchaser, followed by an offer in slump, and an obligation to accept of the title as sufficient. The propriety of following one or other of these modes appears from the nature of the questions which have occurred on this subject. (2.) It has been stated as a general rule, that the seller must furnish or complete, at his own expense, a legal progress; but it falls to the purchaser to state specific and relevant objections to the progress offered (*h*). Where that has been done, nothing short of an express renunciation of his right will throw the burden and expense of completing the title on the purchaser (*i*). Such renunciation may be in the form of an obligation to accept as sufficient certain titles specified, either in the minute of sale itself or in a separate inventory, or expressed in general comprehensive terms (*k*). Clauses of this nature are most usual in articles of roup. (3.) But although the purchaser has not renounced his right, he cannot maintain the general obligation on the seller, to the effect both of retaining possession of the subjects, and withholding the price. When that obligation resolves into *factum imprestabile*, an impossibility, the purchaser must accept of the title such as it is, or renounce the purchase (*l*).

4. *Entry with the superior.*—(1.) The question frequently occurs in practice, if a seller is bound to complete a public infeftment by entry with the superior, before disponing to the purchaser? The general rule is undoubted, that the seller must deliver a sufficient title; and it has been expressly held, that he is bound to complete a real right to the subject at his own expense, when there is no provision to the con-

trary (*m.*) But the term real right is very comprehensive. A seller holding a disposition from his own author, with an indefinite precept on which infeftment has been duly perfected, has a real right in his person; and on his disposition, with a like precept, the purchaser may complete a valid title at an expense not greater than if the seller were entered by confirmation. (2.) But if the subjects are in non-entry by the death of the seller's author, or other person who, as vassal, was last vested and seised in the fee, and the superior is thus in a situation to demand a composition, and require that the investiture shall be renewed, there seems to be no reason to doubt, that, under the obligation to furnish a complete title, the seller must enter with the superior prior to granting the disposition to the purchaser; or, at least, undertake the obligation of completing a public right in the person of the purchaser. In these circumstances, it is not unusual to provide that the charter and infeftment shall be completed in the name of the purchaser, at the mutual expense of the purchaser and seller; and under an arrangement of this nature, which implies that the fee shall become full in the person of the purchaser, he ought to pay a part of the composition exigible by the superior.

(*a*) And farther, the said A. BINDS and OBLIGES him and his foresaids, along with the said disposition, to deliver to the said B., or his foresaids, a sufficient legal title and progress to the said lands and others, and that to the satisfaction of C., *(the name of the referee to be mentioned,)* whom failing of D., in the event of the parties not agreeing betwixt themselves as to the sufficiency of the title offered.

(*b*) Anderson, 4th Dec. 1818, F. C.; Carruthers, 26th May 1825, F. C., 4 S. 34.

(*c*) Nairne, 17th June 1676, M. 14,169; Little, 14th Feb. 1749, M. 14,177; Durham, 9th July 1800, M. 16,641. See Marjoribanks, 22d Feb. 1715, M. 14,187.

(*d*) Lockhart, 13th July 1742, M. 14,176, Elch. *Tailzie*, 21; Tait, 20th Dec. 1749, M. 14,177.

(*e*) See Pollock v. Waddel, 19th June 1828, F. C., 6 S. 999.

(*f*) Dick, 12th Dec. 1826, 2 W. and S. (Ap.) 522.

(*g*) Buchanan, 25th June 1799, M. 14,593; Davidson, 28th Feb. 1810, F. C.

(*h*) Paton, March 1682, M. 14,170. See Bell's Pr. 890.

(*i*) Smith, 13th Feb. 1827, F. C., 5 S. 340. The clause obliged the seller "to grant in favour of the said B. (the purchaser,) or his foresaids, a disposi- "tion or other deed or deeds necessary for vesting the full right of the said

"subjects now standing in the person of the said A. (the seller,) in the person "of the said B." The seller was ordained to complete a valid title, and not merely to convey the right which he possessed.

(*k*) Rowand, 24th Nov. 1769, M. 14,178; Hay, 10th July 1783, M. 14,183; Anderson, 4th Dec. 1818, F. C.

(*l*) Hepburn or Aikman, 10th Dec. 1772, M. 14,179; affirmed, 30th April 1773.

(*m*) Gardiner, 7th March 1799, M. 15,037.

103. OBLIGATION TO PURGE INCUMBRANCES (*a*).—1. *Import of the term.*—(1.) It is equally the duty of the seller to clear the subject of incumbrances before the disposition is accepted (*b*), as to furnish a legal progress of titles; and in practice he produces a certificate of searches in the registers for a period of forty years, when there is no stipulation to the contrary. (See *Searches of Incumbrances.*) (2.) Incumbrance, in a large sense, means a legal restriction on the right of property, howsoever constituted; but, in the common acceptation of the term, it imports only those burdens which appear on the registers. These may be real, such as heritable debts voluntary or by adjudication, and other restrictions on the fee, clothed with infeftment; or personal, and producing merely the *nexus* of litigiosity, such as inhibitions, and inchoate or incomplete adjudications. Public burdens, again, are those by law imposed on all heritable property; (above, § 60).

2. *Burdens appearing on the registers.*—(1.) It is only the incumbrances which appear on the registers or records that are comprehended under the obligation in question, and it follows, from the nature of the obligation, that the seller must purge these before the price is paid. The purchaser, it would seem, is not in strict law bound to discharge them out of the price even *unico contextu* with receiving the disposition (*c*). But there can be no practical difficulty here, when parties understand one another, and a refusal by the purchaser so to settle the transaction would be highly unreasonable. If the discharges have not been put upon record, a sum sufficient for the purpose may be retained out of the price, as the purchaser is entitled to have them registered (*d*). (2.) It has been seen that the positive prescription does not of itself fortify the title of the seller, so as to exclude objection; (above, § 102. 2.) The same rule holds where the negative prescrip-

tion, which is equally liable to interruptions, is pleaded in extinction of a real burden. The record must be cleared of the incumbrance (*e*).

3. *Burdens not appearing on the registers.*—(1.) Restrictions on the fee, such as a negative servitude of a burdensome nature (*f*), a latent burden by sub-tack (*g*), or a heavy feu-duty (*h*), although truly incumbrances on the right of property, do not fall within the scope of the obligation: they are regarded as restraints on the natural uses of the subject, or limitations of its value, which parties transacting with a seller are entitled to have disclosed prior to the sale; and when not taken into account by a purchaser in his estimation of the worth of the subject, their extinction must be obtained by the seller, or a corresponding deduction given from the price. The same rule will necessarily apply to incumbrances which are not disclosed by searches for the ordinary term of forty years. (2.) But when the purchaser expressly undertakes to implement obligations incumbent on the seller, *e. g.* in favour of tenants, he is presumed to have satisfied himself of their extent, and nothing short of intentional concealment on the part of the seller will subject him in relief (*i*). Burdens appearing on the titles, or known to the purchaser, although not made real by entering the register, cannot be safely overlooked; for although a *bona fide* purchaser may not be affected by such burdens, that character may be compromised by assisting to defeat the personal right (*k*).

(*a*) AND FARTHER, the said A. binds and obliges himself and his foresaids to disburden the said lands and others of all debts and incumbrances whatever which may or can affect the same, contrary to the stipulations hereof, or to the prejudice of the said B. or his foresaids, and that before receiving any part of the said price; or it shall be in the option of the said B. and his foresaids to pay and discharge therefrom all real or heritable debts affecting the said lands.

(*b*) See Horne, 28th May 1824, 3 S. 81.

(*c*) Ross, 10th June 1829, 7 S. 738.

(*d*) Cargill, 1st April 1822, 1 S. Ap. 134.

(*e*) Mitchell, 27th Nov. 1827, 6 S. 135.

(*f*) Urquhart, 2d June 1835, F. C. 13 S. 844.

(*g*) Ferrier, 9th June 1823, 1 S. (Ap.) 455.

(*h*) Tr. of Corstorphine Roads, 1st July 1794, Bell's Cases, 52; Paton, 11th March 1825, 3 S. 653.

(*i*) Murray, 26th Jan. 1815, F. C.

(*k*) Ralston, 17th June 1830, 8 S. 927.

104. TERM OF ENTRY (*a*).—(1.) The term of the purchaser's entry will be fixed according to circumstances; and, where the estate is unencumbered, there can be no difficulty in the arrangements. When, however, the purchaser has an object in obtaining possession at a term certain, and it is desirable that the lands should be purged of incumbrances, and the title completed prior to that term, it is advisable so to express the obligation to give possession with a clear title, as to leave no doubt as to the rights of the parties in case of non-implement. The contract of sale is binding on both parties or on neither; and where one, therefore, refuses to implement his side, the other may at his option be free. (2.) Even where the obligation is not in terms so express as to void the contract, and there is inexcusable delay, the Court will, *ex equitate*, interfere to protect a party against loss by awarding damages (*b*), or annulling the sale (*c*); but the question in such cases is plainly circumstantial. Thus, where the delay is not solely attributable to one party, or discussions arise with respect to the title or the burdens on the subject, the Court will decide according to the facts of the case (*d*). (3.) A party who has bargained for possession, and a clear and complete title at a term certain, may, without question, act up to the strict letter of the agreement, and renounce the purchase, if the seller fail to implement his part of it, at least after giving due premonition to the seller of his intention (*e*); but the safe rule for the conveyancer, where the purchaser has transacted with the view of turning the subject to profit, and must therefore have entry with a clear title at a particular period, is to add a declaration and provision, that, failing implement on the part of the seller, the sale shall be absolutely null, without the necessity of premonition or process of law.

(*a*) And it is hereby declared, that the said B. shall have right to the rents, maills and duties of the said lands and others for crop 18 , and for all crops and years thereafter, *(or, when the subject is a house,* to the rents falling due after the term of entry, and for all years and terms thereafter,) the said A. being bound and obliged to free and relieve the said B. of all ministers' stipends, schoolmasters' salaries, and other public and parochial burdens due and payable for the said lands and others previous to the term of 18 , which is hereby declared to be the term of the said B.'s entry thereto, and of the cess or land-tax thereof, to the ; the said B. and his foresaids being

obliged to free and relieve the said A. and his foresaids of the said burdens and taxations in all time thereafter.

(*b*) Little's Tr. 29th Jan. 1830, 8 S. 418.

(*c*) Hutchison, 22d Jan. 1830, 8 S. 377.

(*d*) See Ross, 10th June 1829, 7 S. 738; Smith, 19th Nov. 1829, 8 S. 84; Raeburn, 5th July 1832, 10 S. 761.

(*e*) Hunter, 17th Jan. 1822, 1 S. 248.

105. OBLIGATION ON THE BUYER (*a*).—The buyer's duty is to pay the price stipulated by the agreement of parties.

1. *Price ought to be fixed.*—(1.) It is not essential to the validity of a sale, that the price shall be absolutely fixed. A reference to arbiters is a competent mode of having it adjusted, and is likewise binding on the heirs of the parties although not expressed (*b*). A paction even to leave the price to be fixed by the buyer has been held obligatory on the seller (*c*). These are modes of transacting not to be followed, but avoided. (2.) It is as a general rule advisable that the price should be a slump sum, so as to exclude all discussion as to the data on which it is to be calculated. Purchase by a rental is especially to be avoided, as questions of a vexatious nature may arise depending on the items of which the rental is composed (*d*). Services due by tenants, or things prestable in kind, such as kain fowls, are not included in the rental, unless estimated in money (*e*).

2. *Interest.*—(1.) The price is understood to bear legal interest from the date of the purchaser's possession, when a term is not specified (*f*). (2.) In a case where the validity of the title was disputed, it was held in the House of Lords, that interest was due from the date at which a valid title was put into process by the seller, but not sooner; and that the rents and profits belonged to the purchaser from the same period (*g*). (3.) In judicial sales the matter of interest, as well as the period for consignation, is regulated by statute (*h*); and the Lord Ordinary at the sale (*i*), or the Court, on the application of the purchaser (*k*), has no power to relieve him from the payment of legal interest, by authorising consignation at a period earlier than the term specified in the statute.

3. *Term of payment of the price.*—The obligation on the buyer being conditional on the delivery of a disposition

with a clear and complete title, he may, in the general case, retain the price, on stating valid objections to the title, or until incumbrances are cleared (*l*); but this right is subject to the equitable interference of the Court (*m*), and it may be lost by being restricted to a particular number of years (*n*).

4. *Mode of settlement.*—This will be expressed according to the agreement of parties. For example, it may be arranged that the incumbrances shall be cleared out of the price, and paid at the sight of the purchaser; or he may undertake to discharge out of the price, or take upon himself certain specified burdens, such as a liferent annuity, or provisions in favour of the seller's relatives. The alterations necessary for expressing usual stipulations, and the concluding formal clauses of the deed, will be found in the Style-book (*o*).

(*a*) FOR WHICH CAUSES, and on the other part, the said B. binds and obliges him, his heirs and successors, at the said term of , and upon delivery of the disposition above mentioned, to make payment to the said A., and his heirs and assignees, of the sum of £. as the stipulated price of the said lands and others above described, or in the option of the said B. and his foresaids, to grant bond, with a sufficient cautioner or cautioners, or other security to the satisfaction of the said A. or his foresaids, for payment to them of the said price, and that at and against the term of with a fifth part more of the said price of liquidate penalty in case of failure, and the due and ordinary annualrent of the said price, from and after the said term of payment, during the not payment.

(*b*) E. of Selkirk, 17th Jan. 1778, M. 627.

(*c*) E. of Montrose, 13th March 1639, M. 14,155.

(*d*) See Gordon, 27th Jan. 1829, 7 S. 323.

(*e*) Mitchell, 1st July 1773, M. 14,159.

(*f*) Speirs, 5th June 1827, 5 S. 764.

(*g*) Dick, 30th Nov. 1830, F. C., 9 S. 93; affirmed, 1st Oct. 1831.

(*h*) 54 Geo. III. c. 137, § 6. See Learmonth, 1st March 1828, 6 S. 673.

(*i*) Hunter, 16th Jan. 1829, 7 S. 270; Learmonth, 8th June 1822, 1 S. 476.

(*k*) Rose, 10th July 1835, 13 S. 1094.

(*l*) Cargill, 1st April 1822, 1 S. Ap. 134. See Durham, 9th July 1800, M. 16,641.

(*m*) Marjoribanks, 22d Feb. 1715, M. 14,187.

(*n*) Smith, 2d July 1706, M. 14,184.

(*o*) Jurid. Styles, 1. 90, 91.

TITLE IV. ARTICLES OF ROUP (*a*).

106. ADVANTAGES OF PUBLIC SALE.—Sales of land property under articles of roup and sale have become frequent. This mode ensures competition when the subject is in demand, and has many advantages in the terms on which the property may be exposed. The exposer may suit the stipulations and the price to his own views; and if the latter be too high, it may be reduced until it reach the views of offerers. Time is likewise given to parties for satisfying themselves in regard to the rental, burdens and title-deeds of the subjects prior to the sale, so that they may adjust their offers to the circumstances of the case. In judicial sales and sales proceeding under the authority of the Court, this deed is indispensable. The deed styled *Articles of roup* thus calls for observations which would be out of place in reference to the minute of sale, the object of which is limited to clearing the way for the disposition, after the general terms of the bargain have been adjusted in private. The simple form of the articles of roup contains the clauses or articles, which are now briefly to be noticed.

(*a*) See Jurid. Styles, 1. 92, and foll.

107. TITLE OR INTRODUCTION (*a*).—The articles are headed by an introduction, which contains a description of the subjects, and expresses the time fixed for exposing them. (1.) The description ought to be without reference to prior advertisements, for errors in these would thus qualify the sale. The safe rule for the conveyancer is to adopt the description contained in the title-deeds. Where lands were exposed by a particular name, as *consisting of ninety-four acres or thereby*, precisely as expressed in the titles, but which proved to contain only seventy-seven acres, the specification was held to be descriptive, not taxative; and as fraud could not be substantiated, the purchaser was refused any deduction from the price. But he was allowed to renounce the bargain (*b*). Where, however, lands were sold as possessing an advantage which the purchaser was induced to believe to belong to them, the

want of it was found relevant to diminish the price (*c*). These were cases of voluntary sale. (2.) In judicial sales, the Court have for a long period followed the rule of refusing a deduction from the price on any ground whatever; but from equity the purchaser is, in circumstances of hardship arising from error, allowed the option of giving up the bargain. Such option was given where a part of the subjects sold was claimed as the property of another (*d*); and likewise where they were of less extent than was stated in the advertisements (*e*). These may be regarded as examples of error *in substantialibus*. (3.) Equal justice must on the other hand be dealt out to the exposer. Thus, where the price was calculated on two and a half in place of seven acres, the sale was restricted to the smaller quantity; but the purchaser was permitted to renounce the bargain (*f*).

(*a*) ARTICLES AND CONDITIONS of the roup and sale of all and whole, (*describe the subjects as in the title-deeds,*) which whole lands and others before mentioned belong in property to A., and are to be exposed to sale by public roup, by the said A., within the upon the day of betwixt the hours of and .

(*b*) Gray, 23d Jan. 1801, M. App. *Sale*, 2.

(*c*) Maclean, 23d June 1757, M. 14,164.

(*d*) Lloyds, 13th Feb. 1782, M. 13,334.

(*e*) Hannay, 26th Jan. 1785, M. 13,334.

(*f*) Hepburn, 4th July 1781, M. 14,168.

108. ARTICLE I. PRICE, &c.—In the first clause or article of the deed are expressed the sum at which the subjects are to be exposed, called the upset price, and the mode of exposing them.

1. *Upset price.*—(1.) This is in practice fixed at the pleasure of the exposer, although a subject may be put up at the pleasure of the company (*b*); and where there has been no undue or fraudulent concealment on the part of the exposer, the upset price would probably be regarded as a slump sum, and bearing no reference to rental, measurement or other circumstances. It is advisable, however, so to frame the clause as to exclude discussion. Accordingly, where the articles contain a declaration that the subjects are exposed in slump, without reference to rental, &c. (*c*), or that the rental is not to be

relied on (*d*), such declaration is held to exclude an allegation of deficiency in the former case, and in the latter of errors in the rental. (2.) In judicial sales, repeated instances have occurred of diminution in the amount of the proven rental, (the rental ascertained under the authority of the Court,) between the date of the proof and that of the sale. In these, the Court have proceeded on the principle, that the upset price in judicial sales must uniformly be regarded as a slump sum fixed without respect to the permanency of the rental, which is ascertained chiefly for declaring the bankruptcy of the debtor. Nothing short of undue concealment, therefore, will annul a formal judicial sale, and a deduction from the price has been invariably disallowed (*e*). It thus becomes the duty of the practitioner to inquire minutely into the rental, &c. prior to offering at a judicial sale.

2. *Mode of exposing.*—The subjects are put up for competition during the running of a half-hour sand-glass, and if competition ensue, the limitation in time is taken off. In such circumstances, it is plain that to confine the sale to any precise period would be unjust to all the bidders, except that one who chanced to offer at the precise instant when the sand became exhausted, as well as against the interest of the exposer himself. It is accordingly the duty of the judge of the roup to prolong the period while the competition lasts, and that whether a sand-glass or a watch be used for marking the time. This may be done by laying the sand-glass on its side, or stopping the watch (*f*). But after the competition ends, the time cannot be prolonged. Where there is one bidder only, the exposer may avail himself of the entire running of the sand-glass.

(*a*) *Primo*, The foresaid lands and others are to be exposed to sale by public roup, during the running of a half-hour sand-glass, at the sum of L. sterling; and the person offering the said upset price, or in case of more offerers than one, the highest offerer at the out-running of the said sand-glass shall be preferred to the purchase.

(*b*) Cree, 1st Dec. 1810, F. C.

(*c*) Heddle, 30th May 1823, 2 S. 350. The subjects were exposed "for a "slump sum, without regard to any rental, valuation, or any fixed number of years' "purchase, and without the exposer undertaking to uphold any measurement, "or any specification of public burdens, as to all which the purchaser shall be "understood to have satisfied himself; and no deduction shall be allowed from

"the price, nor any delay or indulgence be granted in the payment thereof on "any account whatever."

(*d*) Urquhart, 8th Feb. 1769, M. 14,163. The clause was thus expressed: "The price put upon the said lands and estate is not understood to have any "reference to the rental, and therefore the purchaser and offerers must satisfy "themselves of the justness thereof before the roup; and it is hereby expressly "declared, that no objections against it shall be competent thereafter."

(*e*) Couts, 13th Jan. 1725, M. 13,328; Cockpen, 22d Dec. 1732, M. 13,329; Wilson, 14th Nov. 1764, M. 13,330; Inglis, 27th June 1788, M. 13,335.

(*f*) Burns, 27th Nov. 1807, M. App. *Sale*, 4.

109. ARTICLE II. OFFERS (*a*).—The next clause usually provides that each subsequent offer shall exceed the former by a certain fixed sum, and that the offerers shall subscribe their respective offers.

1. *What makes a sale.*—When an upset price is fixed, a single offer necessarily constitutes a sale; and the same rule seems to hold where a subject is exposed at the pleasure of the company (*b*); for as the offerer is obliged by his offer, so must the exposer be bound to the only or the highest offerer, by the act of setting up the subject to auction. But when an upset price is not fixed, and the subject is put up without reference to the pleasure of the company, the sale is obviously at the pleasure of the exposer; and as there is no implied contract, it would seem that the exposer himself may bid, or what is equivalent, withdraw the subject unless he receive an offer to his satisfaction (*c*).

2. *Rights of the exposer.*—A combination amongst intending bidders to defeat the purpose of a public sale is *pactum illicitum*, which, if acted on, will void the sale, and subject the parties in the loss and damage resulting from the combination. The value of a subject is the price which it will bring at a fair sale, and the effect of a combination to purchase at a lower price than some of the conspirators would otherwise have offered, is the same as if influence or deception were used to prevent offerers from coming forward (*d*).

3. *Rights of the offerers.*—(1.) As the exposer in ordinary circumstances, cannot directly interfere (*e*), so is he prohibited from bidding by means of another (*f*). A *bona fide* offerer cannot suffer by unreal and fictitious offers made virtually by the exposer, as there is truly no offer made against him. (2.) It is said on high authority (*g*), that an exposer may

validly reserve by express words a right to one or more biddings, in other words, turn himself into an offerer; but the Scotch cases referred to by the learned author do not appear to sanction the doctrine, and the statutory grant of such a power to road trustees (*h*) seems to imply its non-existence at common law. The fixing of an upset price seems inconsistent with any reservation, and where none is expressed a reservation appears to be unnecessary. (3.) It is plainly illegal for the exposer to employ others to raise the price by fictitious offers. A person so employed is called a *white-bonnet*, and his offers go for nothing, in a question with a real bidder, as made virtually by the exposer (*i*); although there appears no reason to doubt that he would be bound to implement his offer, in so far as exceeding that of the real bidder, to creditors having interest in the subjects (*k*).

(*a*) *Secundo*, In case several offers shall be made for the said lands and others, every subsequent offer shall be at least L. sterling more than the immediately preceding offer; and each offerer shall subscribe his offer, and become bound and obliged to pay the sum offered, in the terms and upon the conditions expressed in these articles.

(*b*) Cree, 1st Dec. 1810, F. C.

(*c*) More's notes on Stair, p. 91.

(*d*) Murray, 1st March 1783, M. 9567

(*e*) Jeffrey, 16th June 1826, F. C., 4 S. 722.

(*f*) Anderson, 16th Dec. 1814, F. C.

(*g*) Bell's Princ. 131-2.

(*h*) 4 Geo. IV. c. 95, § 53.

(*i*) Gray, 7th Aug. 1735, M. 9560.

(*k*) See Watson, 17th Jan. 1743, M. 4892-3; Lord Kilkerran's Report.

110. ARTICLE III. TERM OF ENTRY (*a*).—This article declares the term of entry and the period from which the price shall bear interest.

(*a*) *Tertio*, The person preferred to the purchase of the said lands and others shall have right to the rents thereof from and after the term of which is hereby declared the term of his entry to the said lands; and the price offered shall be payable to the said A., his heirs, executors or assignees, against the term of and shall bear interest from and after the term of during the not payment.

111. ARTICLE IV. CAUTION (*a*).—The provision in this article is, that the highest and last offerer shall grant bond, with a cautioner, for the amount of his offer.

(a) *Quarto*, The highest and last offerer shall be obliged, within thirty days after the said day of roup, to grant bond for the price offered by him, with a sufficient cautioner or other security to the satisfaction of the exposer, payable at the term above specified, with a fifth part more thereof of penalty in case of failure, and interest as above specified.

112. ARTICLE V. LIABILITY OF PRIOR OFFERERS (a).—The mode of having recourse on the prior offerers, in the event of the provision in Article 4. being disregarded, is here prescribed. (1.) It is now a settled point, that the stipulation in regard to caution is beneficial to the exposer only, and that the offerer, second in point of amount, acquires no right to enforce it until he has been called on by the exposer to find caution; upon which he may demand reciprocal performance, although the highest offerer should still propose to implement the stipulation (b). (2.) The difference between the first and second offers, as a loss sustained by the failure of the first offerer to find caution, may be recovered from him by the exposer by way of action (c). (3.) It often happens that the same person makes more than one offer at a sale; but the highest offerer has not, in respect of a lower offer, a right to a second period for finding caution, where he, as highest offerer, and also the second offerer, have failed to find caution (d). These were cases of judicial sales; but it is thought the same principles must apply to public voluntary sales, since the obligations on the purchaser arise in both instances *ex contractu*.

(a) In case the person preferred to the purchase shall fail to grant security as aforesaid, he shall not only forfeit his interest in the said purchase, but shall be liable to the exposer in one-fifth part of the price offered by him, in name of damages; and it shall be optional to the said A. either to hold the said lands and others himself, or of new to expose the same to sale, or to declare the same to belong to the immediately preceding offerer; and in case intimation of the said failure to find caution shall be made to the immediately preceding offerer within forty days after such failure, he shall be deemed the purchaser, and shall be obliged, within the space of thirty days after such intimation, to grant sufficient security as aforesaid, for the price offered by him, under the like penalty and forfeiture, and so forth through the whole course of offerers, until these articles be fulfilled.

(b) Walker, 10th Feb. 1787, M. 14,193; Hannay, 15th July 1788, M. 14,194.

(c) Creditors of Currie, 13th Dec. 1791, M. 3162.

(d) Davidson, 19th Jan. 1815, F. C.

113. ARTICLE VI. INCUMBRANCES (*a*).—The obligation on the seller to disburden the subjects of incumbrances, and grant a disposition, is expressed in this clause. Any stipulation contrary to the usual practice, or the manifest interest of a purchaser, would necessarily retard a sale, and the terms of this clause, if differing from the ordinary form, ought to be well considered. (1.) It is not unfrequent, however, to stipulate, that the incumbrances shall be cleared *simul et semel* with the payment of the price, an arrangement which cannot reasonably be opposed; and, when the lands are truly unencumbered, the exposer may relieve himself of the obligation at common law to furnish searches, by providing that the purchasers must satisfy themselves in regard to the burdens, and that at their own expense, unless they shall make it appear by a certificate of search that incumbrances do exist. The same form may be adopted where the incumbrances which truly affect the subjects are specified (*b*). (2.) It is expedient to enumerate here those burdens and restrictions on the fee which cannot be discovered from the records, such as feuduties, servitudes, stipulations in tacks, and the like. (See above, § 103. 3.) (3.) Where subjects are exposed by the trustee on a sequestrated estate by voluntary roup, it is provided by statute (*c*), that the sale shall be valid, under the burden of real securities and other liens upon the estate to the amount of the price. The purchaser, therefore, may purge incumbrances out of the price, and that before paying over any part of it; but although he should undertake that the price shall be paid to the trustee, the purchaser does not thereby resort to the personal responsibility of the trustee, but may insist that the subjects shall be disencumbered out of the funds of the estate (*d*).

(*a*) *Sexto*, Upon the purchaser's making payment of the price, or granting security as aforesaid, the said A. shall be bound and obliged, as he hereby binds and obliges himself, to purge the said lands of all incumbrances affecting the same, and to grant and subscribe a formal and valid disposition of the foresaid lands and others to the purchaser and his heirs and assignees, containing procuratory of resignation, clause of absolute warrandice, (under the exception of the existing tacks and feu rights of the said subjects,) assignation to the writs and evidents, and rents, maills and duties of the foresaid lands and others for crop

and year , and in all time thereafter, precept of sasine, and all other usual and necessary clauses.

(*b*) Jur. Styles, 1. 96, *et seq.*

(*c*) 54 Geo. III. c. 137, § 42.

(*d*) Moir, 27th May 1830, F. C., 8 S. 823.

114. ARTICLE VII. PUBLIC BURDENS (*a*).—This clause expresses the respective obligations of the parties in regard to public burdens. (See above, § 57. 3, 60.)

(*a*) *Septimo*, The said A. shall be bound and obliged, as he hereby binds and obliges himself and his foresaids, to free and relieve the purchaser and the said lands and others, of all feu, blench and teind duties, ministers' stipends, schoolmasters' salaries, and other legal and public burdens due and payable out of the said lands and others for crop and year , and of the cess or land-tax payable for the same preceding the day of ; and the purchaser shall be obliged to free and relieve the said A. and his foresaids of the said feu, blench and teind duties, ministers' stipends, schoolmasters' salaries, and all future augmentations thereof, cess, and other legal and public burdens, from and after the said respective periods, and in all time coming.

115. ARTICLE VIII. (*a*).—TO DELIVER A SUFFICIENT PROGRESS.—In the Style Book this clause is so expressed as to bind the exposer to deliver to the purchaser a sufficient progress of titles; and at the same time it is stipulated that the purchaser shall satisfy himself before the roup of the sufficiency of the progress offered, and be barred from future objection. The clause ought to be more cautiously expressed (*b*); and when the *right* is undoubted, the exposer ought either to undertake to complete the *title* at his own expense, or stipulate that the purchaser shall be satisfied with the progress offered.

(*a*) *Octavo*, Along with the said disposition there shall be delivered to the purchaser a progress of writs and title-deeds of the said lands, and others, conform to an inventory thereof subscribed by the said A., as relative hereto; DECLARING, That the purchaser shall be understood to have satisfied himself with the sufficiency of the said progress and title-deeds previous to the roup, and shall not be entitled to object to the same thereafter upon any ground whatever.

(*b*) See Rowand, 24th Nov. 1769, M. 14,178. It was provided, "that the "seller should be liable in warrandice from fact and deed allenarly, and to "deliver such writs as he had in his custody, conform to inventory herewith "produced, and to be shewn at the roup, consisting of seventeen in number, "with the sufficiency of which progress the purchasers are to satisfy themselves

" before the roup; and by their becoming offerers are entirely debarred from ma-
" king any objections against payment of the price on that account." This clause was held to bar the purchaser from objecting to the progress.—Hay, 10th July 1783, M. 14,183. The sale was by a trustee for creditors. It was stipulated in the articles of roup, that the creditors should assign to the purchasers their debts and rights, with warrandice to the extent of the price; and that the purchasers should accept such titles as were in the possession of the creditors, which were specified by an inventory. Here also the purchaser was precluded from stating objections to the title.—Anderson, 4th Dec. 1818, F. C. The progress to be delivered was thus described: " Along with the said disposition
" there shall be delivered to the purchaser the titles of the said subjects which
" are to be produced at the sale, viz. (here they are specified.) The exposers
" shall also obtain the said C. served heir in general to his father, and expede
" a sasine in favour of him and the surviving partners of the said company;
" which titles are hereby declared a sufficient progress. The purchaser shall
" be considered to have satisfied himself thereanent; and it shall not be in his
" power to state any objections to the title-deeds, or the disposition to be grant-
" ed by the persons above mentioned, in consequence of said titles, or retain
" any part of the price, under pretence of such defect." The clause was held effectual.—Carruthers, 26th May 1825, 4 S. 34.

116. ARTICLE IX. AUCTION-DUTY (*a*).—(1.) It is usually provided, that the auction-duty shall be paid by the parties equally. This tax is not incurred by merely exposing the subjects; there must be an actual sale. A case occurred which ought to serve as a warning to the practitioner in selling by private bargain after the adjournment of a roup. The agent for the exposer, and certain intending offerers having returned to the auction-room some hours after the adjournment, on the understanding that the highest offerer on missives to be opened by the agent, should be the purchaser, and a sale having thus been concluded, the proceedings were held to form one continued transaction, and to fall within the scope of the Excise statutes (*b*). (2.) It is customary, in like manner, to provide that the expense of the conveyance shall be divided. That expense is understood in practice to embrace the fees of preparing and engrossing the disposition only, and not to include the stamp-duty, the revising fee, or the expense of the sasine. It is usual, therefore, to mention in express words the stamp-duty and revising fee; but the expense of the infeftment and instrument of sasine is uniformly paid by the purchaser. In the absence of an arrangement of this sort, the whole cost of placing a formal and valid deed of con-

veyance in the hands of the purchaser must be defrayed by the seller (*c*).

(*a*) *Nono*, It is hereby declared that one-half of the tax or duty imposed by law upon the sale of lands disposed of by public roup or auction, shall be paid by the exposer, and the other half thereof by the purchaser.

(*b*) Walker, 8th July 1813, Dow's App. 1. 111.

(*c*) Ross, 2. 298-9; Colston, 15th Feb. 1557, M. 6539; Hall, March 1583, M. 6539; Pringle, 17th Feb. 1629, M. 6541.

117. ARTICLE X. (*a*).—(1.) The tenth clause contains the appointment of the judge of the roup, whose duties are not very distinctly marked. It is manifest, however, that he must have full power to determine absolutely all matters of mere detail with respect to the priority and amount of offers made at the sale, and to reject offers not in terms of the articles and conditions. It is usual, but apparently not essential, that the judge should subscribe the minute by which the highest offerer is declared to be the purchaser. (2.) This clause concludes with a reference of all questions respecting the real intent and meaning of the stipulations in the articles, and the referee ought to be named. His powers embrace an inquiry in regard to fictitious offers (*b*).

(*a*) DECIMO, That C. shall be judge of the roup, with power to determine whatever questions and differences may occur betwixt the offerers and sellers, or betwixt the offerers themselves, in relation to the foresaid roup, and with power also to adjourn the said roup from time to time as he shall think proper, and to prefer the highest offerer to the purchase, in manner above specified; and if any questions shall arise regarding the real intent and meaning of these articles, the same are hereby submitted and referred to the determination of D., as sole arbiter nominated and appointed for that purpose, who is empowered finally to determine the same.

(*b*) Ewing, 13th Jan. 1825, F. C.

118. LAST ARTICLE, PENALTY, &c. (*a*).—The deed concludes with an agreement to implement the conditions undertaken by the exposer in subscribing the articles, and by the offerers in subscribing their respective offers, and a clause of registration for execution. The forms of the offers, minute of adjournment, &c. will be found in the Style-book (*b*).

(*a*) LASTLY, The exposer, by subscribing these presents, and the offerers, by

subscribing their respective offers, oblige themselves mutually to implement the foresaid articles to each other, under the penalty of £. to be paid by the party failing to the party performing or willing to perform, over and above performance. And they consent to the registration, &c.

(*b*) Jurid. Styles, 1. 95, *et seq.*

TITLE V. OF THE TITLE OF THE SELLER.

119. WHAT A SUFFICIENT PROGRESS.—Before concluding these observations on the steps preliminary to the granting of the disposition of sale, it is necessary to advert shortly to the seller's title, which, in practice, seldom comes under the examination of the purchaser's agent until after a bargain has been concluded, and to the use and effect of a search of the registers. This subject falls properly within the scope of the minute of sale, but it is too extensive to be disposed of under a single head. It is here again necessary to distinguish between the *right* and the *title* of a seller. The latter, consisting of the chain of deeds under which the lands are held, may be defective where the right is unquestionable; and it falls to be judged of with reference to a wide field of inquiry, which embraces the formal as well as the feudal sufficiency of the various deeds of which it consists. Practice, combined with a knowledge of feudal principles and forms, is essential for enabling the conveyancer to pronounce upon its sufficiency. With regard, again, to the right, the question is complex. A secure right may flow during the lapse of time out of a formal title, although the right of the party from whom the title was derived may have been defective; and it is of importance that the conveyancer should be enabled to judge in what a title consists which may thus fortify the right.

120. POSITIVE PRESCRIPTION.—A prescriptive title depends for its efficacy on statute (*a*), which establishes a *præsumptio juris et de jure*,—an absolute presumption not to be taken off by contrary evidence, in favour of those persons and their heirs and successors, who have possessed their heritages by virtue of infeftments for the space of forty years *continually and together following and ensuing the date of their infeftments*, without lawful interruption, and founds a defence against all

ground, reason or argument competent of law except falsehood. The condition of the statute is, that the parties shall be able to shew and produce a charter preceding the forty years' possession, with the sasine following upon it; or where there is no charter extant, instruments of sasine, one or more, continued and standing together for the said space, either proceeding upon retours or precepts of *clare constat*. The term *heritages*, as employed in this statute, is interpreted to comprehend not only proper feudal rights, but also those rights, privileges, servitudes and burdens connected with land to which a valid title may be completed without sasine (*b*).

(*a*) 1617, c. 12. OUR SOVERANE LORD considering the great prejudice which his Majesty's Lieges sustains in their lands and heritages not only by the abstracting corrupting and concealing of their true evidents in their minority and less age, and by the amission thereof by the injury of time through war plague fire or such like occasions but also by the counterfeiting and forging of false evidents and writs and concealing of the same to such a time that all means of improving thereof is taken away whereby his Majesty's Lieges are constitute in a great uncertainty of their heritable rights and divers pleas and actions are moved against them after expiring of thirty or fourty years which nevertheless by the Civil law, and by the lawes of all nations are declared void and ineffectual. And his Majestie according to his fatherly care which his Majesty hath to ease and remove the griefs of his subjects being willing to cut off all occasions of pleas and to put them in certainty of their heritage in all time coming: Therefore his Majesty with advice and consent of the Estates of Parliament by the tenor of this present Act STATUTES FINDS and DECLARES that whatsoever his Majesty's Lieges their predecessors and authors have bruiked heretofore or shall happen to bruik in time coming by themselves their tennants and others having their rights their lands barronies annualrents and other heritage by virtue of their heritable infeftments made to them by his Majestie or others their superiors and authors for the space of fortie years continually and together following and insuing the date of their said infeftments and that peaceably without any lawful interruption made to them therein during the said space of fortie years that such persons their heirs and successors shall never be troubled pursued nor inquieted in the heritable right and property of their said lands and heritages foresaid by his Majesty or others their superiors and authors their heirs and successors nor by any other person pretending right to the same by virtue of prior infeftments public or private nor upon no other ground reason or argument competent of law, except for falsehood PROVIDING they be able to shew and produce a charter of the said lands and others foresaid granted to them or their predecessors by their said superiours and authors preceding the entry of the said forty years' possession with the instrument of seasing following thereupon, or where there is no charter extant, that they shew and produce instruments of seasine one or more continued and standing together for the said space of forty years either proceeding upon retours or upon precepts of *clare constat* which

Rights his Majesty with advice and consent of the Estates foresaid FINDS and DECLARES to be good valid and sufficient Rights (being clad with the said peaceable and continual possession of forty years) without any lawful interruption as said is for bruiking of the heritable right of the same lands and others foresaid. AND SICKLIKE his Majesty with advice foresaid, STATUTES and ORDAINES that all actions competent of the law upon heritable bonds reversions contracts or others whatsoever either already made or to be made after the date hereof shall be pursued within the space of forty years after the date of the same except the said reversions be incorporate within the body of the infeftments used and produced by the possessor of the said lands for his title of the same or registrated in the Clerk of Register his books, in the which case seeing all suspicion of falsehood ceases most justly the actions upon the said reversions ingrossed and registrated ought to be perpetual, EXCEPTING always from this present Act all actions of warrandice which shall not prescribe from the date of the bond or infeftment whereupon the warrandice is sought but only from the date of the distress which shall prescribe it not being pursued within forty years as said is And sicklike it is DECLARED that in the course of the said forty years' prescription the years of minority and less age shall no wayes be counted but only the years during the which the parties against whom the prescription is used and objected were majors and past twenty-one years of age. *(The act concludes with a saving clause in favour of parties against whose claims prescription would have run prior to its date.)*

(*b*) Ersk. 3. 7. 3; Bell's Princ. 2003.

121. TITLE OF A SINGULAR SUCCESSOR.—The words of the statute import a distinction between the title of a purchaser or disponee who acquires right *titulo singulari*, by a special or particular conveyance, and that of an heir, who succeeds *titulo generali*, by a universal title. The title of the first consists in a charter and sasine *ex facie* valid.

1. *Charter.*—Under the term charter are included disposition, procuratory of resignation, contract or other deed effectual for the alienation of heritage (*a*); and thus a precept of *clare constat*, which is limited to the infeftment of an heir, is excluded (*b*). (1.) It seems to be an open question, if the charter must contain the immediate warrant for infeftment. Lord Stair (*c*) makes mention of two kinds of mediate titles, a *de præsenti* conveyance, and an obligation to grant infeftment; and inclines to the opinion that either would, in favourable circumstances, be sustained as sufficient, although not immediately connecting with the sasine and thus forming part of the investiture. And a bare precept of sasine, referring merely to the deed of conveyance, with the instrument following upon it, he considers a valid title (*d*). (2.) A char-

ter or other deed of conveyance *a non domino*,—by a party not the proprietor of the lands, is effectual to ground prescription, because the statute excludes all objections competent before the expiry of the forty years, excepting falsehood only (*e*). A charter prior in date to the period when instruments of sasine came into use, followed by possession, is considered an infeftment in the sense of the statute, and therefore a good prescriptive title (*f*). (3.) A charter of lands or other feudal subjects is a good title for the prescription of positive servitudes, without mention of them in the charter (*g*). (4). The same rule applies to accessory rights properly belonging to the subject, such as coal or other minerals, and which had been reserved from the grant (*h*).

2. *Sasine*.—(1.) An instrument of sasine is, by the terms of the statute, an indispensable part of the prescriptive title in rights strictly feudal; and when it contains both the warrant and the record of the actual infeftment, as a sasine *propriis manibus*, such, it is probable, would of itself be sustained, on the principle recognised with respect to sasines in burghs, where the resignation and sasine are both expressed in the instrument (*i*). (2.) The sasine must necessarily be an *ex facie* valid deed; but objections to which a sufficient answer is possible will be repelled, since all favourable pleas are established by the lapse of the statutory period (*k*); and every document essential to the right is presumed to have existed, and to have perished by the injury of time, provided the statutory title can be produced. (3.) A doubt has been thrown by a high authority on the sufficiency of an extract from the register of sasines to *ground* prescription (*l*). An extract is ineffectual as a title on which to *plead* prescription, because a party challenging the title does so by improbation; but the ground of the prescription, it is thought, is the register itself, by means of which the tenor of the instrument may be proved so as to draw back to its date and registration. If the loss or destruction of the principal instrument should be held to destroy the efficacy of the title as a title of prescription, a change in our system of registration is loudly called for; (see above, § 82.) (4.) The disponee of an heir may eik out his title by founding on that of the

disponer; (below, § 121.) (5.) Teinds and patronages may, so long as they have not been feudalised, (see above, § 49. 3,) be acquired by prescription in virtue of a personal title (*m*). (6.) Servitudes, and parts and pertinents depend, as mere accessories, upon the title to the principal subject.

(*a*) Ersk. 3. 7. 4.
(*b*) Finlay, 27th Jan. 1774, M. 6904.
(*c*) Stair, 2. 3. 19.
(*d*) Stair, 2. 12. 20.
(*e*) Ersk. 3. 7. 4; D. of Buccleuch, 30th Nov. 1826, F. C., 5 S. 57.
(*f*) See Aytoun, 4th June 1833, F. C., 11 S. 676.
(*g*) Ersk. 2. 9. 3; Bell's Princ. 993.
(*h*) Forbes, 31st Jan. 1822, F. C., 1 S. 282; and on remit, 20th Nov. 1827, 6 S. 167. See Crawford, 10th July 1821, 1 S. 111.
(*i*) Bell's Princ. 2010, and cases cited; Ersk. 3. 7. 5.
(*k*) Scott, 1st July 1779, M. 13,519.
(*l*) Bell's Princ. 2010.
(*m*) Stair, 2. 12. 23; Ersk. 3. 7. 3; Irvine, Nov. 1764, M. 10,830.

122. TITLE OF AN HEIR.—(1.) An heir is exempted from producing the warrant of the sasine or sasines on which his possession has proceeded, nor is he called on to instruct that there existed a retour or precept of *clare constat*, otherwise than by the tenor of the sasine (*a*). It is thus of no moment that the precept flowed *a non domino*, or that the sasine was taken after the death of the superior (*b*). (2.) The warrants of the sasines being protected from all exception, it is unnecessary for an heir producing a sasine or sasines in terms of the statute, to produce a charter or other deed of conveyance dated beyond the forty years, since, even although such deed were invalid, the heir would not thereby lose the benefit of his statutory title (*c*). (3.) It is incumbent on the heir to produce a sasine bearing to proceed on a retour or precept of *clare constat*, or a series of sasines proceeding on consecutive retours or precepts of *clare constat;* but the act does not require that the sasines shall be exactly continuous. This would indeed be impracticable, as some interval must always elapse after the death of the ancestor, before his heir is infefted; so that unless possession for the full statutory period were maintained by one individual on a single sasine, the prescription would necessarily be interrupted, and the act rendered in a great

degree inoperative. This effect was early perceived, and it was held that a party pleading prescription may take advantage of his predecessor's sasine, if himself connected with it by a sasine (*d*). (4.) But it is now fixed that the sasine of the predecessor, as being the ground of the possession of an apparent heir, or the disponee of an heir, may be founded on without a renewal of the infeftment (*e*); and the converse will necessarily hold good, that the heir of a disponee may found upon his ancestor's charter and sasine. It seems to be essential only that the party pleading prescription have the inherent right, and be in a situation to connect himself with the sasine of an heir, or the charter and sasine of a disponee (*f*); and he may complete his title, and produce it even after litigiosity (*g*). (5.) Sasine in favour of an heir by hasp and staple, *more burgi*, is a good prescriptive title (*h*).

(*a*) Stair, 2. 12. 15; Erak. 3. 7. 4; E. of Argyll, 15th Feb. 1671, M. 10,791.
(*b*) Miller, 7th Feb. 1766, M. 10,937; Purdie, 9th Nov. 1739, M. 10,796.
(*c*) Monro, 19th May 1812, F. C. (By Lord Gillies.)
(*d*) Stair, Erak., as above; E. of Argyll, as above.
(*e*) Caitcheon, 22d Jan. 1791, M. 10,810; Miller, 7th Feb. 1766, M. 10,937.
(*f*) Waddell, 19th June 1828, F. C., 6 S. 999.
(*g*) Crawford, 20th Dec. 1822, F. C.
(*h*) Erak. 3. 7. 5.

123. TITLE OF AN ADJUDGER.—Charter and sasine proceeding on a decree of adjudication is an available title to prescribe an irredeemable right to the subjects adjudged, after the expiry of the legal, without a decree of declarator (*a*); and it may be assumed from analogy, that a sasine *more burgi* on such a warrant would be sufficient within burgh. Objections to the warrant of the charter, as in the ordinary case, and to the resting owing of the debt, are excluded by the lapse of the forty years (*b*).

(*a*) Caitcheon, 22d Jan. 1791, M. 10,810; Johnston, 7th June 1745, M. 10,789; Robertson, 10th May 1815, H. of L., 3 Dow, 108. See Ormiston, 7th Feb. 1809, F. C.; Dalziel, 17th Jan. 1810, F. C.; M'Lellan, 9th Dec. 1763, B. S. 5. 893; More's Notes on Stair, *v. Prescription. Note.*—Mr Bell (Princ. 2012,) lays it down that adjudication, followed by sasine, is a good prescriptive title, without reference to the expiry of the legal; but the cases do not

appear to go that length, although a decree of declarator has been held unnecessary.

(*b*) Ged, 5th Dec. 1740, M. 10,789.

124. POSSESSION.—1. *Nature of the possession.*—(1.) The possession for the prescriptive period must be *continuously and together* following the date of the first infeftment. It follows, perhaps, that a sasine duly registered is a sufficient prescriptive title from its date, without regard to that of the registration. (2.) Possession need not be actual and real, but only civil, by the *parties, their tenants or others having their rights.* These include adjudgers (*a*), wadsetters, liferenters, heritable creditors, disponees before infeftment, and the like (*b*); and all inquiry into the origin of the possession is excluded (*c*). (3.) But the possession of the superior is not only not beneficial to the vassal, but operates to cut down his base right; for the title to the superiority being *ex facie* a title to the lands, *tanquam optimum maximum*, possession on it for the prescriptive period excludes all inquiry as to other rights of property. And the same rule seems to maintain, even where the titles to the superiority and property are in the person of the same individual (*d*). (4.) Possession must be perfect in degree. Thus, the exercise of salmon-fishing by means less slender than net and coble is not relevant to infer the right under a clause *cum piscationibus*; (above, § 49. 2.) (*e*). (5.) The possession of a right of patronage is of an anomalous description, and depends greatly upon circumstances; but the exercise of it on at least two separate occasions, without interruption used against the prescriber, or neglect on his part during the intervals or any part of the forty years, seems requisite for the security of his title (*f*). (6.) Possession of teinds must be to the exclusion not of the minister, but of the titular.

2. *Interruption of possession.*—(1.) Prescription may be interrupted *via facti*, by assuming possession; by notarial protest; or by judicial process. Interruption by process must proceed on a summons passing the Signet, and executed by a messenger-at-arms. (2.) Instruments and summonses of interruption, and their executions, to be available against purchasers and singular successors, must be registered in the

register of interruptions within sixty days from the date of the instrument or execution (*g*); and by the same statute it is declared, that interruptions *via facti* shall be effectual against the heritor and possessor of the ground only, unless an instrument be taken upon the fact and duly registered. (3.) Interruption *via facti* merely breaks the course of prescription: that by citation lasts only for seven years (*h*), unless followed by an action, which prolongs its effects for forty years (*i*). (4.) Minority suspends, but interrupts not the course of prescription, and is available only to the party in the actual right (*k*).

(*a*) *Note.*—The possession of an adjudger having a charter and sasine, which is itself a prescriptive right, is thus available both for and against the proprietor. See M'Lellan, 9th Dec. 1763, B. S. 5. 893.

(*b*) Erak. 3. 7. 5; 2. 1. 22; Younger, 30th June 1665, M. 10,924; Miller, 7th Feb. 1766, M. 10,937.

(*c*) Wilson, 6th August 1766, B. S. 5. 543, 926, 930, and H. of L. 10th Feb. 1770; Johnston, 7th June 1745, M. 10,789; Maclean, 2d July 1777, B. S. 5. 544.

(*d*) Campbell, 19th Dec. 1765, B. S. 5. 915; Bruce Arnott, 6th Dec. 1770, M. 10,805; Middleton, 22d Dec. 1774, M. 10,944, B. S. 5. 614; Hailes, 587. See Harvie, 29th Jan. 1822, F. C., 1 S. 277; Lord Elibank, 21st Nov. 1833, F. C., 12 S. 74; Bontine, 2d March 1837, 15 D. 711.

(*e*) Chisholm, 17th June 1801, M. App. *Salm.-Fishing*, 1; D. of Sutherland, 11th June 1836, F. C., 14 D. 960. See Forbes, 3d Dec. 1701, M. 10,929.

(*f*) Stair, 4. 40. 20; Erak. 3. 7. 3; Earl of Home, 28th July 1758, M. 10,777, as reversed on Ap.; Macdonell, 26th Feb. 1828, F. C., 6 S. 600.

(*g*) 1696, c. 19.

(*h*) 1669, c. 10.

(*i*) Erak. 3. 7. 43-45; Wilson, 2d Feb. 1705, M. 10,974. See Wallace, 7th July 1830, F. C., 8 S. 1018.

(*k*) Erak. 3. 7. 45; Bell's Princ. 2022.

125. POSSESSION ON DOUBLE TITLE.—It often happens that the conveyancer must form an opinion upon the validity of the title offered to a purchaser, in circumstances where the application of the rules of prescription is by no means clear. These chiefly occur where the seller has two separate titles in his person. When the titles are both unlimited, he may of course grant a valid conveyance; but if one is limited and the other unlimited, the rules which seem to be clearly ascertained are, (1.) If the seller possess on a fee-simple apparency, and

likewise as having right under an entail, the entail, although not feudalised, being the title on which he is by law bound to possess, will be regarded as the *lex feudi*,—the regulating title. To it, accordingly, will the possession be ascribed, so as to exclude prescription upon the unlimited title (*a*). A purchaser, therefore, aware of the existence of the entail, may not be *in bona fide* in transacting with the proprietor. (2.) Where, again, by making up titles in fee-simple, the seller or his predecessor has clearly indicated his preference to the unlimited title, the possession will be ascribed to it, and the fetters of the entail held to be worked off by force of the positive prescription (*b*). (3.) But where the actual title of possession contains terms reserving all right which the proprietor may have under the deserted title, prescription is regarded as inconsistent with the terms of such title of possession (*c*). The further prosecution of the subject of prescription would be foreign to the object of a work of a practical nature (*d*).

(*a*) Maxwell, 21st June 1808, M. App. *Prescript.* 8 ; Lumsdaine, 13th June 1811, F. C.

(*b*) Ersk. 3. 7. 6 : Bell's Princ. 2020, and cases cited.

(*c*) Dalzyell, 17th Jan. 1810, F. C.

(*d*) *Note.*—The principle which regulates the points noticed in this section, plainly is, that possession is to be ascribed to that title which the proprietor by his acts declares to have the preference in his own mind. But where the titles are both unlimited, it has been held that he cannot confer a preference upon either by renewing it in his own person, because service is not an effectual mode of altering a destination; (Smith, 30th June 1752, M. 10,803 ; Durham, 24th Nov. 1802, M. 11,220.) Possession is accordingly ascribed to both indifferently. The consequence is, that when one of the titles embraces a series of heirs different from the heirs-general of the proprietor, although contained in deeds neglected by him, the estate may possibly pass to a stranger after a long period of years. The only ground on which this distinction can be maintained seems to be, that a party who has the power to alter a destination and neglects to alter it, is presumed to make it his own ; but it must be observed, that by passing by the destination, he clearly indicates his wish to ascribe his possession to another title ; and that the latency of the deed containing the destination, which may be a frequent case, must exclude the presumption that he has adopted its provisions. (See Zuille, 4th March 1813, F. C., and opinion of Lord Gillies.)

TITLE VI. SEARCHES OF INCUMBRANCES.

126. NEGATIVE PRESCRIPTION.—1. *Application of the statute.*—The security of the purchaser against heritable debts

and other incumbrances is founded on the negative prescription. By the act of 1617 (*a*) it is provided, that "all actions "competent of the law on heritable bonds, reversions, con- "tracts or others whatsoever, shall be pursued within forty "years from the date of the same, except the said reversions "be incorporated in the body of an infeftment; and that "minority and less age sall no ways be counted, but only the "years during which the parties against whom the prescrip- "tion is used were majors." These terms apply to burdens, incumbrances, and rights of action only, and do not affect rights of property (*b*).

2. *Time from which prescription runs.*—(1.) In interpreting this statute, the Court have fixed the period at which the debt or right can be demanded in judgment, as the time from which the prescription of *bonds* and other obligations begins to run (*c*). (2.) *Reversions*, again, are specially excepted from the operation of the statute, when incorporated in the body of an infeftment, which implies their due registration (*d*); but sasine on a bond in no respect affects the course of prescription, since the feudal right is merely accessory to the debt. (3.) Prescription runs against a decree of *adjudication* from its date, or, if followed by infeftment, from the date of a duly registered sasine (*e*).

3. *How interrupted.*—(1.) Prescription of *heritable securities* is interrupted extrajudicially by partial payments of principal or interest, by an engagement to pay interest, although payment is not made within the forty years, by special submission, or by written acknowledgment of the resting owing of the debt (*f*); and judicially, by citation of the debtor in an action for payment, by the diligence of horning and poinding, arrestment, inhibition or adjudication, or by production of the grounds of debt in an action to which he is a party, or the proceedings under a sequestration of his estate (*g*). (2.) Of *adjudications*, the prescription is interrupted by possession of the subjects, or even by infeftment on the decree (*h*); but after decree of declarator of the expiry of the legal, the adjudication becomes a right of property, and is therefore not subject to the negative prescription (*i*). (3.) Of *inhibitions*, the prescription begins to run not from the date of the execution, or even that of registration, but

from the publication by sasine, or the use of real diligence upon the right granted in prejudice of the inhibition: it is interrupted by an action of reduction of the prejudicial deed *ex capite inhibitionis*, or production of the grounds of debt in a sequestration (*k*). (4.) *Infeftments in real warrandice* do not prescribe till after the eviction of the principal subject, although, when the title to the principal subject is fortified by prescription, the nexus flies off.

(*a*) 1617, c. 12, above, p. 173.

(*b*) Erak. 3. 7. 8; Bell's Princ. 2017, and cases cited. See, in particular, Paul, 8th Feb. 1814, F. C. This case illustrates the distinction between a *right of property* and a *right of action*. The subjects had been adjudged *beyond* the forty years. Possession followed, and decree of declarator of expiry of the legal was obtained, but the charter and sasine had been expede *within* the prescriptive period. The adjudger had thus acquired an undoubted feudal title, although not a prescriptive right to the subject. The party challenging was the heir of the debtor, and his right to reduce the decree of declarator was held to be lost by the negative prescription.—See also Macdonell, 26th Feb. 1828, F. C., 6 S. 600, (opinions of Lords Mackenzie and Corehouse.) The combined view of the operation of the positive and negative prescriptions, so generally taken, (Erak. 3. 7. 8,) appears to be unnecessary for the solution of cases on competing titles. The positive prescription is completed by possession on a feudal title for forty years, and the right of the party is declared by the statute to be invincible, except on the single plea of falsehood. This prescription operates, therefore, not only *for* the possessor but *against* all others, and it does not require the aid of the negative prescription to cut down the opposing title. This last applies, by the plain meaning of the statute, to burdens and incumbrances only, and not to rights of property.—See also E. of Dundonald, 12th May 1836, F.C., 14 D. 737.

(*c*) Erak. 3. 7. 6.

(*d*) Elliott, Jan. 1727, M. 10,977; Munro, 19th May 1812, F. C.; Geddes, 28th May 1819, F. C. See Chambers, 6th June 1823, 2 S. 366. See Hamilton, 28th Jan. 1834, F. C., 12 S. 349. *Note.*—A reversion thus protected is a very anomalous right. Although, as a right of redemption merely, it is of a lower description than a feudal right of property followed by possession, it is good in competition with such right, even when fortified by the lapse of the prescriptive period.

(*e*) Anderson, 3d March 1758, M. 10,676.

(*f*) Erak. 3. 7. 39; Bell's Princ. 616; Blair, 7th Feb. 1672, M. 11,235; Guthry, 5th June 1696, M. 11,257; Skene, Feb. 1686, M. 11,256; Vans, 14th June 1816, F. C.

(*g*) Erak. as above; Bell's Princ. 615-622; 33 Geo. III. c. 74.

(*h*) King, 24th Feb. 1828, 6 S. 643.

(*i*) Robertson, 2d Aug. 1770, M. 10,694; Ross, Dec. 1776, B. S. 5. 543.

(*k*) Erak. 3. 7. 36, 38; Moutry, 22d Nov. 1682, M. 11,187; 33 Geo. III. c. 74.

(*l*) 1617, c. 12, as above. See Durham, 9th July 1800, M. 16,641.

127. DEFECTS OF A SEARCH FOR FORTY YEARS.—It follows from what is stated in § 126, that searches of the registers of *sasines*, *reversions*, &c., of *inhibitions* and of *adjudications*, are not sufficient to exhibit all those burdens which may attach to lands, or shew that they are entirely free from incumbrances. Heritable bonds, or other securities for debt, may be preserved for a long period by payments of interest, or other modes of interruption. Adjudications may have been followed by possession, and, with regard to inhibitions, their operation seems to be perpetual, excepting as against parties to whom deeds may have been granted in prejudice of the diligence. Forty years are understood, however, to be the legal term beyond which the seller is not bound to furnish a search of the registers; but, in suspicious cases, it is plainly the interest of the purchaser, and the duty of his agent, to carry the inquiry to a more remote period. The chief dangers which may remain undiscovered by searching the registers for the usual period are mentioned below, (§ 128,) but there are many risks to which a purchaser is exposed which cannot be discovered from the registers. These form the principal and a very great security to purchasers, and one which our neighbours appear resolved to deny themselves in the face of reason and experience; but they do not exclude the necessity, on the part of the seller, of occasionally resorting to other sources of information.

128. DANGERS NOT APPEARING FROM THE REGISTERS.—1. *Litigiosity.*—The chief risks to which purchasers are exposed arise, *first*, from judicial proceedings, which, during the period of their operation, produce either a sequestration of property, or an interdict against the proprietor, to the effect of preventing alienation or the constitution of heritable burdens to any extent, in the one case, and in the other to the prejudice of the party using the diligence; and, *secondly*, from claims, objections and burdens which attach to property in the hands of onerous disponees, as affecting the title of the disponer. Of the first class *Litigiosity* is the chief. (1.) Litigiosity by action, which operates as a sequestration of the property for behoof of the party who prefers the claim, is pro-

duced by the calling in court of a summons of declarator or of reduction for trying the right of property, or of ranking and sale for disposing of subjects by judicial sale and dividing the price among creditors (*a*), and retains its effect during the dependence of the action (*b*). (2.) Litigiosity by diligence is produced by the execution of a summons of adjudication (*c*), or the publication of letters of inhibition (*d*). In the latter case, the effect continues till registration of the diligence, when the interdict assumes the perfect form of a completed inhibition: in the former it lasts till decree is pronounced, if no undue delay occur on the part of the creditor, and thence for a reasonable time within which he must either obtain infeftment or charge the superior to give an entry. If he take this latter step, infeftment may be deferred till after the expiry of the legal (*e*); but if neither course be followed within a reasonable period (*f*), the litigiosity expires, and the voluntary deeds of the debtor will receive effect. (3.) The existence of inchoate inhibitions and adjudications can only be discovered by examining the warrants of signet letters and summonses at the Signet-office. Of these an index ought therefore to be formed.

2. *Deathbed.*—The plea of *deathbed* is a ground of reduction which attaches to the property, and, as it affects a purchaser (*g*), it will follow the subject in the hands of his disponee.

3. *Fraud*, &c.—Forgery and fraud are grounds of reduction by statute (*h*), and, as affecting the right, will attach to the property in the hands of an onerous disponee.

4. *Claims of ancestor's creditors.*—The right of the creditors of the deceased to a preference over his heritage is preserved by a statute (*i*), which enacts, that "no right or "disposition made by the apparent heir, so far as may pre-"judge his predecessor's creditors, shall be valid unless made "and granted a full year after the defunct's death." This enactment restrains the heir, whether entered or possessing on apparency, and affects even his onerous deeds (*k*).

5. *Exception of conjunction and confidence.*—This exception, introduced by statute (*l*), is pleadable against an onerous disponee, when the prohibited relationship or connec-

tion appears on the face of the seller's title; *e. g.* if it express that the seller is brother, son, or steward to the party from whom he received the conveyance; and the seller's title must in such circumstances be supported by positive evidence of onerosity (*m*). But the plea is competent only to the creditors of the party against whose deed conjunction and confidence are pleadable.

6. *Servitudes.*—These, whether positive or negative, may be constituted without infeftment. Negative servitudes are incapable of visible occupation or possession; and as the consent necessary to their constitution may be proved by the titles of either the servient or dominant tenement, or by a writ in a separate form, they are the most latent of all restrictions upon property. (See *Servitudes.*) A purchaser is protected in some degree against the consequences of a negative servitude by the implied obligation on the seller to make known its existence (*n*), and more effectually against a positive servitude by inquiries into the state of possession.

7. *Tacks.*—Tacks or leases are protected against singular successors by statute; and as they are not feudal rights, although materially affecting the value of the subjects, they do not enter any register.

8. *Terce.*—The right of a widow to terce is measured by her husband's sasine under the burden of real rights constituted prior to his decease; but it does not require infeftment in her person, and cannot therefore be discovered from the registers. (See *Marriage-Contract.)*

9. *Courtesy.*—The husband's right of courtesy is in like manner constituted by law, and does not appear in any register. (See *Marriage-Contract.)*

(*a*) Bell's Com. 2. 152; Morison, 8th March 1787, M. 8335.

(*b*) Menzies, 9th Jan. 1760, M. 14,165.

(*c*) Ersk. 2. 12. 41.

(*d*) Ersk. 2. 11. 7.

(*e*) Wallace, 8th Dec. 1736, M. 8388.

(*f*) Duch. of Douglas, 26th July 1764, M. 8390. A *mora* of *near three years* was held to take off litigiosity; and it seems to have been thought that the falling asleep of a process of adjudication would produce this effect.

(*g*) Ersk. 3. 8. 97; Bell's Princ. 1797.

(*h*) 1617, c. 12, above, p. 173.

(*i*) 1661, c. 24.

(*k*) Magis. of Ayr, 14th June 1730, M. 3135; Taylor, 26th Nov. 1747, M. 3128.

(*l*) 1621, c. 18.

(*m*) Erak. 4. 1. 36.

(*n*) Urquhart, 2d June 1835, F. C., 13 S. 844.

129. PRACTICAL RULES.—1. *Voluntary sales.*—The leading rules to be deduced from the preceding observations seem to be these: In transacting a purchase of lands, the purchaser's agent ought in the *first* place to examine the title-deeds of the property in order to satisfy himself that the progress is complete, and a formal and valid title made up in the person of the seller. *Secondly*, To call for a search of incumbrances for the legal period of forty years; and where there is reason to suspect the existence of burdens which may have been preserved in force by minorities or other legal interruptions, such as the payment of interest or of sums to account of the principal, to cause a further search to be made for such a period as will satisfactorily shew the real state of the property. A register of inchoate diligence at the Signet-office would form a valuable addition to the present establishment of public registers. *Thirdly*, To make such inquiries as may lead to the discovery of servitudes or heavy feu-duties, and to examine the leases of the subjects in order to ascertain the true rental as well as their conditions, and whether they have become by possession obligatory on singular successors. *Fourthly*, In the event of incumbrances existing, which the seller is able to discharge, or the price sufficient to extinguish, to enter into a formal minute of sale or other sufficient declaration of a concluded transaction, taking care so to frame the deed as to make the delivery of the disposition contingent on receiving a clear title and unincumbered subject, to provide for the complete extinction of all burdens, and stipulate that a title shall be made up by the seller, (if the title should be defective,) within a fixed period. With respect to the other latent objections which have been noticed, it is obviously impossible to lay down any general rule. Practice, the state of the titles, and the circumstances of the parties, must regulate the conduct of the practitioner.

2. *Public and judicial sales.* — The stipulations in articles of roup may impose additional duties on the man of business. These plainly depend on circumstances. But it will be observed, that in judicial sales the *rental and value* are not warranted, and are not to be depended on; (above, § 108. 1.)

TITLE VII. DISPOSITION OF SALE (*a*).

130. MEANING OF THE TERM.—Having now endeavoured to explain the nature and objects of the forms preliminary to the disposition of sale, and shortly referred to the rules of prescription of real rights, I shall notice in their order the different clauses of that deed. It will be kept in view, that in its ordinary form, the disposition is a deed not of constitution, but of transmission. Stair (*b*) calls it, *the transmission or conveyance of real rights from the disponer to his singular successors;* and although, as a mere conveyance of a *right*, the expressions used by Erskine (*c*) in treating of the charter, that it "imports not whether it be executed in the style "of a disposition or of a charter," may be sufficiently correct, yet as a means of establishing a feudal *title*, there is a marked distinction between the two deeds. The charter is employed to create a subaltern fee, whilst the ultimate object of the disposition is to transmit a fee already constituted to a singular successor, to be held of the same superior in the room and place of the disponer. The disposition, it is true, sometimes assumes the purpose of the charter; but it is then distinguished by the term *feu-disposition*, and is virtually a charter, as containing warrant for infeftment *de me* only. (See § 41.)

(*a*) Jurid. Styles, 1. 100.
(*b*) Stair, 3. 2. 3.
(*c*) Ersk. 2. 3. 19.

131. CLAUSES OF THE DISPOSITION.—The disposition contains the following clauses: 1. The *narrative* or *introductory clause;* 2. The *dispositive;* 3. *Obligation to infeft;* 4. *Procuratory of resignation;* 5. *Clause of absolute warrandice;* 6. *Assignation to rents and title-deeds;* 7. *Clause of warrandice*

of said assignation; 8. *Obligation to free the subjects of public burdens*; 9. *Clause of delivery of the titles*; 10. *Clause of registration*; 11. *Precept of Sasine*; 12. *Testing clause.*

132. NARRATIVE CLAUSE (*a*).—1. *Description of the seller.*—Variations in regard to the seller arise from the nature of his feudal or legal status. (1.) Thus, a party infeft is described as *heritable proprietor* of the lands; an heir-apparent unentered as *eldest lawful son*, &c. (as the case may be,) *and apparent heir of the deceased A. his father*, (or other ancestor); a party having a personal right, that is, an unexecuted procuratory of resignation or precept of sasine in his person, contained in a prior deed of conveyance, as *proprietor* simply (*b*). (2.) The legal status of the seller often occasions the concurrence of other parties in the conveyance. Thus a disposition by a minor *pubes*, (a female between the ages of twelve and twenty-one years complete, and a male between those of fourteen and twenty-one,) is granted with the consent and concurrence of his curators; but although a sale by a minor with such concurrence is not of its own nature invalid, it is subject to reduction on proof of minority and lesion (*c*). (3.) The heritage of a pupil (one under the complete age of twelve if a female, and fourteen if a male,) cannot, however, be alienated without the authority of the Court; and it is *ultra vires* of the Court to sanction a sale, except upon *great and urgent necessity*. In all the more recent cases, the application for authority to sell has been refused (*d*); and the Court have even seen cause to set aside an alienation made under their own authority, and upon evidence that it was for the *utility and advantage* of the pupil (*e*). (4.) A disposition by a husband of lands burdened with a provision in favour of his wife, must proceed with her consent, and be ratified by her out of the presence of her husband; and on the other hand, a disposition of heritage belonging to a married woman must be consented to by the husband, and ought to bear her ratification. Ratification by a wife takes place by her appearing before a Justice of the Peace or other magistrate, and a notary-public and two witnesses, and taking and subscribing a solemn oath and declaration that the deed has been sub-

scribed by her voluntarily, and that she will not quarrel or impugn it. This form is not essential to the validity of a deed executed by a married woman: the want of a ratification is no ground of reduction, where force, fear, fraud or undue influence on the part of the husband cannot be established; it is an element merely in the evidence, which may be of importance in judging of a doubtful case (*f*). The forms necessary for effecting these and the like alterations will be found in the Style-book (*g*). (5.) In the opinion of a considerable majority of the Judges, an outlaw may dispose of the fee of his heritage, the rights of those interested in his single or liferent escheat being unaffected by the conveyance (*h*).

2. *Price or consideration.*—In this clause is inserted the price, or other cause or consideration of granting, the statement of which is conclusive of onerosity until contradicted by the writ or oath of the disponee (*i*). (1.) By the stamp laws, it is essential that the true price be expressed, in respect of which, a stamp indicating an *ad valorem* duty must appear on the face of the deed. When the purchase has been transferred to one or more sub-purchasers, the *ad valorem* duty is charged in whole or proportionally, according to the price or prices payable by the sub-purchaser or sub-purchasers. The immediate purchaser may thus transfer his interest in the bargain and his right to enforce implement, by a deed bearing the ordinary stamp-duty; and if an *ad valorem* duty is paid on such deed, the feudal conveyance by the seller may be written on the ordinary deed stamp (*k*). The purchaser is in explicit terms discharged of the price; and in practice the transaction is settled by payment on the one hand, and delivery of the disposition and title-deeds on the other. (2.) When the transaction consists in the exchange of two parcels of land for mutual convenience, the conveyance usually assumes the form of a *contract of excambion;* but it may be effected by means of separate unilateral dispositions, the consideration being the subjects respectively conveyed (*l*). This latter form is perhaps the more convenient, although not the safer of the two, as it seems to be an open question, if the real warrandice implied in the excambion of lands is inferred by this shape of the conveyance. (See above, § 57. 6.) The

style of the contract is therefore to be recommended (*m*). It may be executed in duplicate, or by means of registration both parties may possess themselves of a warrant for infeftment. (3.) When the disposition has been preceded by a minute of sale or articles of roup, it is customary to notice briefly the prior deed (*n*). (4.) The consideration of a gratuitous disposition is *love, favour and affection.*

(*a*) I A., heritable proprietor of the lands and others after mentioned, IN CONSIDERATION of the sum of L. sterling, instantly paid to me by B., as the price and value of the same, with which I declare myself fully satisfied, and of which I hereby acknowledge the receipt, and discharge the said B. and his heirs and successors for ever.

(*b*) Jurid. Styles, 1. 108.

(*c*) Stair, 1. 6. 44; Ersk. 1. 7. 17, 36, 38.

(*d*) Colt, 3d July 1801, M. 16,387; and App. *Tut. and Cur.* 1; Finlaysons, 22d Dec. 1810, F. C.

(*e*) Vere, 29th Feb. 1804, M. 16,389.

(*f*) *(Form of ratification written on the back of the deed.)* At the day of In presence of D., one of her Majesty's Justices of the Peace for the county of , and also in presence of me, notary-public, and of the witnesses subscribing, COMPEARED personally the within designed B., and in the absence of the within designed A., her husband, RATIFIED and APPROVED of the within written disposition in the whole heads, articles and clauses thereof, and DECLARED that she was noways coacted, compelled or seduced to concur in the same, but that she did so of her own free will and motive, and gave her great oath that she should never quarrel or impugn the same directly or indirectly any manner of way in time coming, as she should answer to God. Whereupon as procurator for C., within designed, asked and took instruments in the hands of me, the said notary-public. THESE THINGS WERE SO DONE, place, day, month and year foresaid, before and in presence of E. and F., witnesses to the premises, specially called and required, and hereto subscribing.

E. *witness.* (Signed) B.
F. *witness.* F. *J. P.*
Juravi. C. *N. P.*

Buchan, 1st March 1834, 12 S. 511.

(*g*) Jurid. Styles, 1. 105-114.

(*h*) Macrae, 22d Nov. 1836, F. C., 15 D. 54.

(*i*) Gordon, 11th June 1833, F. C., S.

(*k*) 48 Geo. III. c. 149; 55 Geo. III. c. 184; and schedule, p. 77-8.

(*l*) Jurid. Styles, 1. 117-121.

(*m*) Jurid. Styles, 1. 121.

(*n*) Jurid. Styles, 1. 114, 116.

133. DISPOSITIVE CLAUSE (*a*).—This clause respects the *disponee*, the *subject conveyed*, and the *real burdens* and *reser-*

vations with which it is intended that it shall be affected. As to the proper dispositive words, see § 45.

(*a*) Have SOLD and DISPONED, as I hereby SELL, ALIENATE and DISPONE from me, my heirs and successors, to and in favour of the said B., and his heirs and assignees whomsoever, heritably and irredeemably, ALL and WHOLE *(describe the lands from the last investiture,)* together with all right, title and interest which I or my predecessors and authors had, have or can any way claim or pretend thereto in all time coming.

134. THE DISPONEE.—Variations may arise from the legal status of the disponee. (1.) If the disponee is a corporation, *e. g.* a royal burgh, the conveyance is made to the provost, magistrates and other members of council, *nominatim, and their successors in office, for themselves, and as representing the whole body and community of the burgh, and their assignees* (*a*); and in regard to corporations generally, it will be observed, that the proper corporate designation must be introduced. (2.) In a disposition to a married woman for her own exclusive use and management, the *jus mariti* of the husband and his right of administration will be excluded. (3.) When it is intended to limit the right of one of two or more disponees, the words of style appropriate to the case must be carefully employed. Conveyances to more than a single disponee (excepting members of corporations as such) are called *conjunct rights*. They are granted to husband and wife, parent and child, or strangers. As being more commonly introduced in conveyances *mortis causa*, they will be explained under other heads. (See *Special Settlement, Marriage-Contract.*) For the variations in style with respect to the disponee, reference is made to the Style-book (*b*).

(*a*) Jurid. Styles, 1. 122. The form here given seems incorrect. There is no authority for holding that the provost, bailies and treasurer represent either the town-council as a body, or the community at large.

(*b*) Jurid. Styles, 1. 121, and foll.

135. THE SUBJECTS.—1. *Variations from the nature of the subjects.*—(1.) The lands or other subject of the disposition will generally be described in the dispositive clause as contained in the former titles; and in this clause, it makes no difference whether the right of the disponer be one of property

or superiority. The term superiority is indefinite, as there may be an unlimited number of fees constituted over one and the same subject; (above, § 31, 39); or if in any case definite, it can apply to the right of the Crown only. It has accordingly been held that a grant of the *superiority and feu-duties* of lands does not confer a title to pursue a declarator of non-entry; and although a different decision was pronounced in an election case, the authority of the prior determination may not be considered as thereby overruled (*a*). (2.) Where a part only of certain lands known by a comprehensive name, such as a baronial designation, is conveyed, it will be described as a part and portion of such lands or barony. If a name is assigned to the portion so conveyed, it will be expressed as the name under which it is for the future to be known, as may likewise be done when a new name is given to lands. (3.) The *nature of the subject* produces variations in the style of the clause. Thus, the form of a disposition of teinds by a titular is in some respects peculiar (*b*). By decreet-arbitral of King Charles I. ratified in Parliament (*c*), heritors are empowered to pursue a valuation and sale of the teinds of their lands, and the titular is bound to dispone them to the heritor at the rate of nine years' purchase. The patron of the parish, again, who has right to the teinds where there is no titular (*d*), is entitled to only six years' purchase. The disposition is granted by the titular or patron, under the express burden of minister's stipend and all augmentations. A disposition of a right of patronage or of salmon-fishings differs but little from the ordinary form (*e*). (4.) The *purpose of the conveyance* may produce variations in the form of the clause. Thus, where teinds are only valued, and a sale is not demanded by the heritor, the titular may require security for the teind-duties. The security to which the statute refers was interpreted by Mackenzie (*f*) to mean infeftment in the lands, and a disposition of the lands in security appears to have been the form at one period employed (*g*); but the Court will not, as a matter of course, award such security to the titular. Their power is discretionary, and their refusal in one instance to appoint the heritor to grant a conveyance (*h*) seems to have discouraged demands of this nature. Again, the conveyance of lands

in real warrandice produces an alteration in the style (*i*). A conveyance of this kind may be made either in the disposition, which contains the principal lands, or in a separate form. The latter is employed to give real warrandice of a subject formerly disponed. This sort of security is almost obsolete; (above, § 57. 6).

2. *Marches.*—Transactions by sale are frequently involved by questions relating to the description of the subjects conveyed. Description of lands by name, or as possessed by tenants or others, can be explained only by evidence extraneous to the deed of conveyance. It may thus in many circumstances be advisable to insert special boundaries or marches in this clause of the disposition. (1.) *Natural boundaries* are obviously preferable to all others, (excepting permanent walls or fences); and of these a river or stream of water and the sea are the most indisputable. Where natural boundaries cannot be expressed with sufficient precision, the description may be aided by reference to a plan; and it is to be observed, that a plan which shews specific natural boundaries is preferable to one framed on the principle of admeasurement. (2.) *Artificial boundaries*, (other than walls or fences,) are imaginary lines traced either on a plan or supposed to extend between march-stones, which may be described in the deed or marked on a relative plan. Where the course of the line between two march-stones is not pointed out, a straight course will in ordinary circumstances be presumed (*k*). (3.) If the marches of a property are controverted, it is plainly advisable for the parties to come to a mutual understanding on the subject. The rule seems *in dubio* to be, that controverted marches are warranted by the seller (*l*). (4.) The mode of describing marches or boundaries deserves attention. Property conveyed as bounded by a particular wall or fence is exclusive of such wall or fence; and such terms, as *together with the said wall or fence*, are plainly inclusive. Where a boundary is to be mutual, it must be so declared in the dispositive clause.

(*a*) Park, 16th May 1816, F. C.; Hamilton, 23d Feb. 1819, F. C. See Mackenzie, 14th Dec. 1822, F. C., 2 S. 90. Here the immediate title was a title to the lands themselves. See Macqueen, 23d Jan. 1824, F. C.

(*b*) Jurid. Styles, 1. 153-4.
(*c*) 2d Sept. 1629, ratified by 1633, c. 17.
(*d*) 1690, c. 23.
(*e*) Jurid. Styles, 1. 156-7.
(*f*) 1633, c. 17; Mack. 2. 10. 16; Ersk. 2. 10. 38.
(*g*) Jurid. Styles, 1. 151-2.
(*h*) Scott, 27th Feb. 1793, M. 15,696.
(*i*) Jurid. Styles, 1. 150-1.
(*k*) See Ewing, 22d Jan. 1828, 6 S. 417.
(*l*) See Farquhar, 7th June 1708; Elch. *Warrandice*, 2; Bell's Conv. of Land, 3d edit. 35.

136. REAL BURDENS.—1. *Terms of constitution.*—Limitations and restrictions on the right of property are not in practice inserted in the disposition of sale, but money burdens only. (1.) A sum of money, *e. g.* a part of the price intended to be left in the purchaser's hands on the security of the property, must be imposed, by terms inserted in the dispositive clause, as a real burden, and not as a mere personal obligation on the disponee. Thus, a declaration that the disponee shall be *burdened with and obliged to pay* certain specified sums, or an express obligation *on the disponee, his heirs, executors and successors* (*a*), or a qualification that the disposition is granted under burdens expressed in this clause, *which are imposed on the disponee by acceptation* (*b*), *or with and under the burden of the payment of the sums of money following to the persons after named* (*c*), imports no more than a personal obligation on the grantee, even although the qualifying terms shall have been engrossed in the sasine and infeftment given in reference to them. The words used must declare *an express burden or real lien affecting the lands or subjects disponed*, qualifying the dispositive clause, and entering the instrument of sasine and the register (*d*), and that whether the right be completed by infeftment on the disposition, followed by confirmation, or by infeftment on a charter of resignation obtained in virtue of the procuratory in the disposition. (2.) As a real burden of an indefinite or uncertain nature cannot be created over feudal subjects, it is likewise essential that both the sums imposed as a burden, and the person in whose favour it is constituted, shall be expressed in the dispositive clause, the sasine and the register; and it is thus not enough

that they are specified in the instrument of sasine, and appear on the register, unless also particularised in the disposition (*e*).

2. *Burdens by reservation.*—(1.) A *reserved burden* in the proper acceptation of the term, is where the price or part of it remains in the hands of the purchaser, and is declared to form a real and preferable security over the lands (*f*). The *real lien*, in correct language, denotes a burden created over lands in favour of third parties, usually in deeds of settlement; (see *Special Settlement*); but the term is often applied indifferently to burdens reserved by the disponer, whether in his own favour or in favour of third parties.

3. *Reserved faculty to burden.*—It may happen that the purchaser takes the conveyance to himself in liferent, and to his wife or his son or other relative in fee. This form is occasionally adopted to save the expense of a title in favour of the purchaser's heir, or to answer the purpose of a settlement, and the disponee is regarded as an heir in a question of collation (*g*). As it is intended that the purchaser shall still remain the substantial fiar, and have the power to exercise the ordinary acts of ownership, he reserves, in express terms, a faculty to dispone or burden the lands at his pleasure (*h*). (1.) This reserved faculty makes the purchaser the virtual but not the feudal proprietor. It dies with him, and the nominal becomes the absolute fiar without the necessity of a service (*i*). (2.) The faculty seems to be available to personal creditors without being exercised, and even after the death of the disponer (*k*). But in order to confer a real right and preference, and be thus available against creditors holding feudal rights, it must be perfected by deed and a registered sasine proceeding on the disponer's right. A right thus completed by infeftment during the lifetime of the disponer will be preferable to the debts and deeds of the disponee; but rights flowing from the disponer and disponee, which have been perfected after the disponer's death, will rank according to the completed sasines (*l*). (3.) It is equally competent to annex to a disposition a faculty to sell or burden the lands, to be exercised by a third person, as to reserve it in favour of the disponer himself (*m*). In either case the power may be compared to the commission or power of sale in

an heritable bond, which is made real by entering the sasine and the register. (See *Bond and Disposition in Security.*) (4.) The faculty may be exercised so as to give a personal claim against the disponee, by a deed not feudalised (*n*).

4. *Mode of transmission and of recovery.*—(1.) In creating a reserved burden or real lien, the modern notion is, that the seller's right and infeftment are not, by the terms usually employed, preserved to the extent of the debt, contrary, however, to the opinion of the late Mr Robert Bell (*o*). It has accordingly been decided that a burden of this nature is assignable, and may be taken up by general service (*p*). A bond is usually taken for a sum reserved in favour of a disponer, in order to warrant personal diligence against the disponee (*q*). (2.) Another consequence is, that a reserved burden or real lien is not a title to pursue maills and duties, and assume possession: infeftment in the subjects is essential to the exercise of such a right. It nevertheless appears to be competent, by the use of appropriate words of style, to preserve the effect of the seller's infeftment, in securing a sum, such as a part of the purchase money, in his own favour, so as to authorise a sale for recovery of the reserved debt (*r*); and if the power of sale may be retained, there seems in principle to be no bar to a reservation by the disponer of a right to revert to his infeftment for the purpose of resuming possession of the subjects, and thus recovering the rents. The importance of this doctrine to the conveyancer is considerable, since a burden of part of the price reserved in favour of the seller may thus be made almost equally efficient as a bond and disposition in security with a power of sale; although it must be admitted that the latter is the more convenient, if not the less burdensome form of security, when the transaction is by way of permanent loan and not a mere temporary accommodation to the purchaser. (3.) Poinding the ground, and adjudication not subject to the law of *pari passu* preference, are the modes of rendering effectual a reserved burden with the interest and penalties attached to it, in the ordinary form of its constitution; and these forms of diligence may be used as well against a singular successor as the immediate disponee (*s*).

5. *Order of preference and ranking.*—The mode of

ranking debts forming real or reserved burdens over feudal subjects, respects the creditor in the burden, the disponer and disponee, and their respective creditors. (1.) The burden being made real by infeftment and registration, the right of the creditor, when a third party, is preferable to that of the other creditors of the disponer holding future real rights. The date and priority of the registration of the sasines are here, as in other cases, the invariable test of preference. (2.) In a competition between the creditor in the real burden or lien, and the adjudging creditors or other singular successors of the disponee, his preference, prior to infeftment on the deed in which the burden is declared, depends upon such declaration, the right acquired by these creditors or singular successors being no broader than that of their author so long as they are not in law held to trust to the register. But after infeftment upon the conveyance has been duly perfected, a singular successor is bound only by the tenor of the completed feudal right. Consequently, if the burden has been omitted from the sasine or the register, a creditor or singular successor of the disponee is preferable to the creditor in the intended real burden. (3.) The creditor in a real burden is preferable in questions with other creditors in such rights, according to the date and priority of the registration of their respective sasines; and the diligence done in virtue of the rights seems to have no effect on the question of ranking in so far as regards the sums in the burdens (*t*). It is stated, indeed, on high authority, that such creditors are preferable amongst themselves according to the date of the diligences which stand in their persons; but it may perhaps be doubted if there is any good ground for the exception. A real burden by reservation would thus be an extremely anomalous right, as being preferable to future heritable securities, and, as *debitum fundi*, even to adjudications on personal debts, but yet requiring adjudication to make it rank before another burden of the same description. The case referred to by that learned author appears, indeed, to have been determined on the express ground that the debts had not been made real burdens, and were mere personal claims against the heir of the granter of the disposition (*u*) See *Preference of Redeemable Rights.*

6. *Forms of attaching reserved burdens.*—It is laid down by Lord Stair, that arrestment and forthcoming are valid forms of diligence for this purpose; but the weight of authority is held to be in favour of adjudication after the burden has been made real by a registered sasine (*v*).

(*a*) Martin, 22d June 1808, M. App. *Pers. and Real*, 5; Forbes's Tr. 14th Dec. 1833, F. C., 12 S. 21.

(*b*) Stewart, 18th May 1792, M. 4649.

(*c*) M'Intyre, 3d Feb. 1824, F. C., 2 S. 664.

(*d*) Ersk. 2. 3. 49; Bell's Princ. 920-1; Bell's Com. 1. 688-9; Broughton's Crs. 20th July 1739, M. 10,247; Stenhouse, 21st Feb. 1765, M. 10,264; Allan, 19th July 1780, M, 10,265, affirmed on ap. See Wylie, 19th Jan. 1830, 8 S. 337.

(*e*) Ersk. 2. 3. 50; Bank. 2. 5. 25; Bell's Princ. 919, and auth. cit. Allan, as above.

(*f*) DECLARING always as it is hereby expressly provided and declared that the lands and others with the pertinents above described are hereby disponed under the express burden of £. sterling being part of the purchase money of the same remaining unpaid, interest thereof from and a fifth part more of penalty in case of failure in punctual payment to me at the term of of the said principal sum, all payable to me the said A. conform to a bond of this date granted by the said B. to me therefor. And which sum of £. sterling interest and penalty as aforesaid, are hereby declared a real and preferable burden affecting the said lands and others before disponed, (*or, as in note* (*r*), *reserve power to revert to the former infeftment,*) and are appointed to be engrossed in the infeftments to follow hereupon, and in all the future transmissions and investitures of the said lands, ay and until complete payment be made thereof in terms of the foresaid bond. (*The obligation to infeft, procuratory of resignation, and precept of sasine will be qualified as follows*): BUT ALWAYS with and under the real burden of the foresaid principal sum of £. interest thereof and liquidate penalty in case of failure payable as above mentioned. See Jurid. Styles, 1. 157.

(*g*) Bailie, 23d Feb. 1809, F. C.

(*h*) DECLARING That although the said lands and others are conveyed to the said C. in fee, yet it shall be free and lawful to the said B. and in his power at any time during his life not only to set tacks thereof to continue for any space of time even after his death for payment of such rents as he shall think proper; but also to alienate and dispone the said lands and others in whole or in part either gratuitously or for onerous causes, and to burden and affect the same with debts to the value thereof; and generally with power to the said B. to do and exercise all other powers acts and deeds concerning the premises without the consent of the said C. and his foresaids, as fully and effectually as if the fee of the said lands and others had been hereby disponed to him.

(*i*) Bell's Pr. 928; M'Lean, B. S. 5. 444. See Wilson, 14th Dec. 1819, F. C.

(*k*) Elliott, 16th Dec. 1698, M. 4130; Rusco, 17th Jan. 1723, M. 4117. See More's Notes on Stair, 192.

(*l*) Bell's Pr. 927-30, and cases cited. In particular, see Lord Kilkerran in Cunningham, 14th Nov. 1739, M. 4133.

(*m*) Bell, as above. Anderson, 24th Dec. 1784, M. 4128.

(*n*) Bell, as above.

(*o*) Bell's Conv. of Land, 3d edit. 96-101; but see note 101.

(*p*) Bell's Pr. 923, and cases cited; Cuthbertson, 7th March 1806, M. App. *Service and Confirm.* 2.

(*q*) Jur. Styles, 1. 157.

(*r*) Fraser *v.* Wilson, 13th Feb. 1822, F. C.; 1 S. 316; affirmed, 2 S. 162. The terms of the reservation were as follows: "But notwithstanding any infeft-"ment or resignation which may follow hereon in favour of the said B., it shall "be lawful to and in the power of me and my foresaids to revert to the infeft-"ment in my favour before narrated, and in virtue thereof and without any "process of declarator to establish our rights, to sell and dispose of the whole "lands and others before described." The question turned upon the nature and effect of a procuratory and instrument of resignation, the competency and efficacy of such a clause in a disposition and sasine being assumed.—See Ross, 2. 239.

(*s*) Bell's Pr. 922; Com. 1. 692, *et seq.* See Bell's Conv. of Land, 3d edit. 103, note.

(*t*) Stair, 2. 3. 54, and 10. 1; and Brodie's edit. 259, note C; Ersk. 2. 3. 49, *et seq.*; Bell's Com. 1. 685, *et seq.*

(*u*) 1661, c. 62; Stair, 2. 10. 1; Ersk. 2. 8. 37; Bell's Com. last ref.; Ross's Cred. 30th June 1714, M. 10,243.

(*v*) Bell's Com. 1. 693.

137. GROUND-ANNUALS.—These belong to the class of real or reserved burdens; but, as rights which are rapidly rising in importance, they deserve separate notice.

1. *Introductory remarks.*—This sort of real burden or lien, which is of the nature of a perpetual annuity, may be redeemable or absolute according to the agreement of parties. It closely resembles the feu-duty, but differs from it in one leading feature, that the ground-annual must appear in the sasines of the subjects charged with it. The ground-annual is a burden on heritable property of by no means modern introduction. It was so ancient even when Mr Erskine wrote, that he rejects the subject as unintelligible. There are, however, several passages in our writers which throw enough of light on it to enable us to comprehend, in a general way, the constitution and nature of *annuals*. They appear to have originally flowed from the same source as the English rent charge, and been constituted in the form of a deed acknowledging the price, and containing the proprietor's consent to *distress* the tenants, or *poind the ground*, for recovery of the annual duty.

In tenements within burgh they were styled *feu-annual*, *ground-annual*, and *top-annual*, terms which are commented on by Skene, followed by Ross. In proper feudal subjects they seem to have acquired the name of *rent-charge*, *feu-annual*, or *ground-annual*, and were substantially rights of annualrent constituted without infeftment. Mr Ross conjectures that they owed their introduction to the statute said to have been passed in imitation of the English statute, *Quia emptores terrarum*, which, as abolishing subaltern infeftments, was the occasion of new expedients for constituting real rights over land property; and it is a circumstance strongly corroborative of this opinion, that the conventional prohibition of sub-infeudation introduced in modern grants of building ground, has been the cause of reviving the ground-annual, which, if duly protected, would be a simple and convenient mode of constituting a perpetual annuity or rent charge (*a*). In a judicial sale, which occurred so late as the year 1762, a claim was advanced which furnishes a remarkable illustration of the subject. The claim was founded on a grant of a rent-charge or ground-annual to the Friars Predicators of St Monance, in the year 1477, completed by possession alone, to which the College of St Andrews had acquired right; and it was sustained by the Court as a real burden on the lands, and appointed to be inserted in the articles of the sale (*b*). Lord Kames, in reporting the case, observes: "It is remarkable that here is a real right "upon land, against which the records afford no security to "a purchaser." The same remark might be applied to the feu-duty, which, however, as being almost a universal burden, escapes particular notice. The two rights were originally parallel. But the rent-charge or ground-annual, being a mere isolated burden, gave place to other forms of security, whilst the feu-duty or feu-annual, being incorporated in and a condition of the original grant of the fee, has kept its place as an inherent quality of the feudal grant, and at the present day it forms the most perfect burden on heritage, as being preferable to all other real burdens, although it does not enter the instrument of sasine and the register.

2. *Constitution.*—The ground-annual is constituted by terms inserted in the dispositive clause, in the same manner

as a real burden or lien by reservation (*c*), and although usually made payable to the seller or disponer of the subjects charged with the burden, it may, like the real lien, be conceived in favour of a third party. It differs in no respect, in principle, from the burden by reservation or real lien, except as being a perpetual annuity in place of a mere temporary burden. It is employed in dispositions of buildings granted by vassals whose charters contain a prohibition against sub-infeudation. When a feuar so situated comes to dispose of his houses to purchasers, he lays a certain fixed duty in name of ground-annual upon each subject. The burden being declared in the dispositive clause of the conveyance, is transferred to the sasine and the register, and thus becomes a real right, which qualifies the fee in the hands of singular successors.

3. *Quality and effect.*—(1.) The real burden of ground-annual being analogous in its nature to that of real lien (*d*), is thus a title to poind the ground, or lead adjudication against, but not to enter into possession of the subjects. It forms also a burden on the disponee constituted by acceptance of the disposition alone, without any express declaration of personal liability, and which cannot be renounced *invito auctore* (*e*),—without the consent of the disponer. It is necessarily postponed to the feu-duty, which, as a condition of the feudal grant, is preferable to all other burdens; but it is prior in effect to real burdens by subsequent constitution, whether voluntary or judicial. In one respect, however, it is less secure than the feu-duty. As a real lien it is transmissible by simple assignation, and it may be extinguished by discharge and renunciation. The ground-annual has not as yet received encouragement from our leading conveyancers (*f*). (2.) Arrears of ground-annuals do not bear interest without express paction (*g*).

(*a*) Skene *de Verb. Sig.* v. *Annual*; Craig, 1. 10. 37-8; Stair, 2. 5. 7; Kames' Law Tracts and App.; Ross, 2. 324-5. See 1551, c. 10; Ersk. 2. 3. 52.

(*b*) College of St Andrews, 3d Feb. 1762, M. 10,171.

(*c*) See Appendix.

(*d*) Bell's Pr. 887-8.

(*e*) Magistrates of Inverness, 28th Nov. 1827, 6 S. 160.

(*f*) See (in App. to Report on Conveyancing, 1838) Examination of A. Storie, Esq. p. 176.

(*g*) Moncrieff, 24th Nov. 1835, 14 D. 61.

138. OBLIGATION TO INFEFT.—1. *Importance of technical accuracy.*—The obligation to give infeftment to the purchaser in the subject sold is *alternative, a me vel de me;* and the precept of sasine, which is relative to and interpreted by this clause, is called *indefinite*, as applying to either manner of holding, base or public. It is of importance to use the proper words of style in framing this clause, the terms which confer on it the alternative application having a technical meaning, and being essential to its efficacy. Thus, where a party bound himself to infeft the disponee *by two infeftments and manners of holding, and that either by resignation or confirmation*, the obligation, as referring solely to the modes of completing a public right, was held to be *a me* only (*b*). The result was similar where the words were, *to be holden in the same manner and for payment of the like feu-duties that I hold or may hold the same and that either by charters of resignation or confirmation or both the one being always without prejudice of the other* (*c*). (See *Charter of Confirmation.*) The variations which occur on this clause are numerous, arising from the feudal status of the disponer.

2. *Seller an heir in apparency.*—(1.) A party possessing this character may competently convey his ancestor's property to a purchaser, and his title, when completed, will accresce to that of the purchaser on the principle of implied warrandice, which is enforced by the operation of the law (*d*). It is, however, to be observed, that where creditors of the ancestor are in competition, the heir, although entered and infeft, cannot dispone sooner than a full year after the ancestor's death, to the prejudice of the predecessor's creditors. The provision of the statute is analogous in effect to inhibition; and although a sale is not therefore absolutely void, the purchaser, to be safe, must retain the price (*e*). (2.) The title of an heir apparent must, to secure the purchaser, be completed during the heir's lifetime (*f*). It is of importance, therefore, that the title be immediately completed; which is advisable for another reason, that the diligence of creditors, if perfected by adjudication and sasine prior to the

heir's infeftment, would be preferable to the purchaser's right. For the purpose, therefore, of enabling the purchaser to complete the title, the seller grants a procuratory, which is embodied in the disposition (*g*). (3.) When the seller dies before his title is made up, the purchaser may resort to the provisions of the statute which subjects an apparent heir passing by his immediate predecessor, who, although unentered, has been in possession for three years, in the debts and deeds of such interjected person, to the extent of the value of the estate. But the claim thereby competent to the purchaser is personal only, not affecting the subjects conveyed, although the heir so passing by cannot challenge the conveyance. In a question, therefore, with such heir (although not as regards the other creditors of the interjected person) the purchaser is safe (*h*). The privilege is not competent to a gratuitous disponee (*i*).

3. *Seller's ancestor uninfeft.*—When the sale is by an heir whose ancestor held a personal right only, he may, in like manner, grant a procuratory for completing his service and title, and his title, when so completed in his own person, will accresce to the infeftment of the purchaser; but, in a question of accretion, a trustee and his constituent are not regarded as the same person. Thus, the feudalising a personal right by the truster, to whom it had been conveyed by the trustee, will not validate a prior subaltern right constituted by grant from the trustee (*k*). But the correct mode is for the seller to serve heir to his ancestor before granting the disposition, which enables him to assign the feudal clauses of the unexecuted disposition to the purchaser, so as to render one sasine sufficient. (See Art. 4.) As regard must be had to the provisions of the statute (*l*), which permits the execution of precepts of sasine and procuratories of resignation, after the death of the granter or grantee, on deducing the title in the sasine, the heir cannot assign the precept contained in his ancestor's personal right to the effect of authorising infeftment prior to his own service, although he may himself grant a precept to the purchaser, the infeftment on which will be validated by his own subsequent service and infeftment.

4. *Seller's right personal.*—Where, again, the disposi-

the cumulo feu-duty proportional to the value or the rental of the share of the subject sold to the disponee; or the amount may be specified. An arrangement of this nature will be valid as in a question between the seller and purchaser, and their representatives; but it is not binding on the superior, who may refuse to enter the purchaser, where the feu-charter contains no obligation to that effect, unless under burden of the entire feu-duty. But as superiors are naturally desirous to accommodate their vassals in such transactions, they seldom refuse to sanction a division of the cumulo feu-duty, if a share greatly disproportionate be not laid on that part of the subject in which an entry is demanded. (See above, § 54. 3.)

(*a*) In WHICH LANDS and others above disponed I hereby bind and oblige myself and my foresaids to infeft and seise the said B. and his foresaids upon their own charges and expenses and that by two several infeftments and manners of holding one thereof to be holden of me and my foresaids in free blench for payment of a penny Scots in name of blench farm at Whitsunday yearly upon the ground of the said lands if asked only and freeing and relieving us of all feu-duties and other duties and services exigible out of the said lands or others by our immediate lawful superiors thereof; and the other of the said infeftments to be holden from me and my foresaids of and under our said immediate lawful superiors in the same manner that I my predecessors and authors held hold or might have holden the same and that either by resignation or confirmation or both the one without prejudice of the other.

(*b*) Peebles, 9th Dec. 1825, F. C., 4 S. 290.

(*c*) M'Nair, 16th Feb. 1827, F. C., 5 S. 372.

(*d*) Stair, 3. 2. 1; Erak. 2. 7. 3; Bell's Princ. 881-2; More's Notes on Stair, p. 293.

(*e*) 1661, c. 24. *(Excerpt.)*—And because it were most unreasonable that the appearand heir when he is served and retoured heir and infeft *respective* should for the full space of three years be bound up from making rights and alienations of his predecessor's estate; and yet it being as unreasonable that he should dispone thereupon immediately or shortly after his predecessor's death in prejudice of his predecessor's creditors he having year and day to advise whether he will enter heir or not Therefore it is hereby DECLARED that no right or disposition made by the said appearand heir in so far as may prejudge his predecessor's creditors shall be valid unless it be made and granted a full year after the defunct's death.—Bell's Com. 1. 735; Magis. of Ayr, 14th June 1780, M. 3135.

(*f*) Keith, 14th Nov. 1792, M. 2933. Observed, that a "sasine obtained "*a non habente* is altogether inept, and cannot be cured by any supervening "right in his heir."

(*g*) Jurid. Styles, 1. 108.

(*h*) 1695, c. 24. (*Excerpt.*)—Our Sovereign Lord considering the frequent frauds and disappointments that creditors do suffer upon the decease of their

debitors, and through the contrivance of appearand heirs in their prejudice: For remeid thereof, and also for facilitating the transmission of heritage in favours of both heirs and creditors: His Majesty with advice and consent of the Estates of Parliament STATUTES and ORDAINS that if any man since the first of January 1661, have served or shall hereafter serve himself heir, or by adjudication on his own bond, hath since the time foresaid succeeded, or shall hereafter succeed, not to his immediate predecessor but to one remoter, as passing by his father to his goodsire, or the like, then, and in that case, he shall be liable for the debts and deeds of the person interjected, to whom he was appearand heir, and who was in the possession of the lands and estate to which he is served, for the space of three years, and that in so far as may extend to the value of the said lands and estate, and no further, deducing the debts already paid.—Ersk. 3. 8. 94; Bell's Princ. § 1929-30; Simson, 1st July 1707, M. 9807; Halkerston, Jan. 1729, M. 9809; Burns, 4th July 1758, M. 5273, 5 B. S. 361. See Ogilvy, 16th Dec. 1817, F. C.

(*i*) Bell's Princ. last ref.

(*k*) Redfearn, 7th March 1816, F. C.; See Norton, 6th July 1813, F. C.

(*l*) 1693, c. 35. (See above, p. 100.)

(*m*) Jurid. Styles, 1. 108-9.

(*n*) Jurid. Styles, 1. 145.

(*o*) Jurid. Styles, last ref.

(*p*) *Note in regard to old freehold votes.*—A Crown vassal desirous of constituting county votes under the former system, proceeded to split or divide the fee into separate fees of superiority and property as follows: Upon a procuratory of resignation granted by himself he obtained a charter of resignation in his own favour. He then executed a feu-charter for an elusory feu-duty in favour of a friend, and having thus created a subaltern right, he disponed the lands (or superiority) to the person who was to acquire right to the vote, assigning to him the unexecuted charter in liferent only, and under the burden of the feu-right. The disponer's infeftment, when perfected by a sasine duly recorded a year before the enrolment, completed the right to the liferent superiority, and enabled him to claim enrolment. The valued rent of the lands behoved to be L.400 Scots, or they must have been a 40s. land of old extent. (1681, c. 21. 16 Geo. II. c. 11.

Another frequent mode of splitting the fee was practised when a proprietor selling his lands wished to retain a freehold qualification. He either granted a feu-charter to the purchaser, of lands of the requisite valued rent, and a disposition of the remainder of the estate; or he included the whole estate in a disposition of sale, and qualified the conveyance with a reserved liferent of the necessary extent—thus; "declaring always as it is hereby expressly "provided and declared that it shall not be in the power of the said B. (the "purchaser) to execute the procuratory of resignation herein after contained "nor to take from the Crown a charter of confirmation of any sasine which may "proceed on the precept of sasine also herein contained so far as respects the "said lands of C. till after the death of me the said A." The seller thus remained the superior of the purchaser in these lands. Such a restriction, however, would plainly have been ineffectual against creditors or singular successors, even when the disposition containing the clause was registered in the Register of Sasines.

Other devices highly ingenious and very numerous were employed for a similar purpose. See *Morrison's Dict. v. Member of Parliament.*

(*q*) 20 Geo. II. c. 50; Jurid. Styles, 1. 147.

139. PROCURATORY OF RESIGNATION (*a*).—See *Charter of Resignation.*

(*a*) AND for completing the said infeftment by resignation I hereby make and constitute and each of them jointly and severally my lawful and irrevocable procurators with full power to them to compear before my immediate lawful superiors of the lands and others above disponed, or their commissioners in their names having power to receive resignations and to grant new infeftments thereupon; AND THERE for me and in my name to resign and surrender as I by these presents RESIGN SURRENDER *simpliciter* UPGIVE OVERGIVE and DELIVER ALL and WHOLE the said lands of C. (*mention the leading names*) all lying and described as aforesaid and here holden as repeated *brevitatis causa* with all right title and interest which I my predecessors and authors had have or could pretend thereto in the hands of my said superiors or their commissioners authorised as aforesaid in favour and for new infeftment of the same to be made given and granted to the said B. and his heirs and assignees heritably and irredeemably in due and competent form; acts instruments and documents thereupon to ask and take and generally to do every thing concerning the premises which I could have done myself or which to the office of procuratory in such cases is known to belong ratifying hereby and confirming whatever my said procurators shall lawfully do or cause to be done in the premises in virtue hereof.

140. CLAUSE OF WARRANDICE (*a*).—1. *Extent of the obligation.*—The warrandice in the disposition of sale is, from the nature of the transaction, absolute, and is in practice expressed; (see above, § 57.) (1.) In transactions which have been managed in the regular course of business, the obligation of warrandice can be little more than nominal, all incumbrances being cleared before delivery of the disposition; but when a purchaser has paid the price, or even granted bond for it to a third party payable at a term certain, trusting to the seller clearing off incumbrances (*b*), the warrandice of the seller is his sole security in case of eviction, and that security is merely personal. (2.) When the purchaser himself transacts with a real creditor, he can have recourse under the warrandice for no more than the transacted sum (*c*). (3.) The obligation is not in the general case available until eviction has taken place (*d*), and therefore, as the disposition supersedes prior writs of a preliminary nature, such as the minute of sale (*e*), which usually binds the seller to clear incumbrances, it is prudent in

doubtful cases to introduce a similar clause into the disposition. This obligation is sometimes imposed in a separate form by express arrangement (*f*). (4.) An obligation of warrandice is not discharged by the purchaser's delay to protect himself by infeftment against a claim not made a real burden on the lands at the date of the disposition (*g*). (5.) In transacting with trustees, who are liable in warrandice only from fact and deed but bind their constituent in absolute warrandice, the purchaser may demand a direct obligation to that effect, and not merely an assignation to the clause of warrandice contained in the trust-deed (*h*), since parties acting even gratuitously must warrant their powers.

2. *Exceptions from the warrandice.*—(1.) It is usual to except in express terms all subaltern rights constituted by the seller or his predecessors, and the leases of the subjects. The latter do not seem to fall within the scope of the obligation; (see above, § 57. 3); but it is advisable to adhere to practice when on the safe side. (2.) These excepted rights are usually, however, declared to be reducible on such grounds of law as may not infer warrandice against the seller, terms which import a personal exception against the purchaser, and have been held to exclude the challenge of a feu-right which contained a renunciation of the casualties of superiority, and of a lease of an exceptionable nature (*i*). It is indeed barely possible to figure a case where success in a reduction of such a right will not import warrandice against the seller. The author would venture, however, to recommend the insertion of the exception of subaltern grants in the dispositive clause of the disposition, in order that it may qualify the conveyance; for although such exception, even in the clause of warrandice, thus operates as against the disponee, it would plainly be ineffectual in a question with an adjudger, whose diligence, when perfected by infeftment, would thus exclude subaltern grants made by the seller or his predecessors which had not been duly feudalised, the vassals in these having no remedy but under their author's personal obligation of warrandice (*k*). The same result might take place where a second purchaser or bond-holder had acquired a right in which the exception was not repeated. (3.)

Tacks which contain the requisites of the statute (*l*), being protected against singular successors when followed by possession prior to infeftment, a purchaser is bound to implement all clauses and obligations contained in such contracts which are proper to their nature. Under these is ranked a stipulation that the tenant shall be indemnified for meliorations at the end of the lease (*m*); but it is inconsistent with the purpose of a lease to make it a security to the tenant for a debt owing by the landlord. Such a transaction, therefore, is not binding on a singular successor (*n*). (4.) Burdens on the landlord not constituted by leases, but imposed by law on the fee, such as the necessary annual repairs of buildings, cannot be thrown on the purchaser for any period prior to his entry, unless by express agreement, although local usage may in particular circumstances produce an exception from the rule (*o*). (5.) As the purchaser is liable in the obligations prestable by the landlord, so the tenants must, on the other hand, pay their rents to him, and he has a valid title by the disposition to raise diligence or action for enforcing payment, according as the leases do or do not contain a clause of registration for execution.

(*a*) WHICH LANDS and others above disponed with this right and disposition of the same and infeftments to follow hereon, I BIND and OBLIGE myself and my foresaids to warrant to the said B. and his foresaids at all hands and against all mortals.

(*b*) Smith, 2d July 1706, M. 14,184.

(*c*) Baiklie, 7th Feb. 1610, M. 9224; Logan, 8th March 1632, M. 9224.

(*d*) Ersk. 2. 3. 30.

(*e*) Sivright, 19th Dec. 1828, F. C., 7 S. 210.

(*f*) Jurid. Styles, 1. 164.

(*g*) Dewar, July 1780, M. 16,637.

(*h*) Forbes's Trustees, 15th June 1822, 1 S. 497.

(*i*) Nasmyth, 9th Nov. 1748, M. 5722; Wight, 17th Nov. 1763, M. 15,199. See Gibson, 18th July 1710, M. 5695.

(*k*) See Dewar, as above.

(*l*) 1449, c. 18.

(*m*) Bell's Princ. 1256, and author. cited. Hunter's Landlord and Tenant, 593.

(*n*) Hunter's Landlord and Tenant, 364, *et seq.* Creditors of Auchinbreck, 11th Feb. 1748, M. 15,248, Elch. *Tack*, 14; L. Cranstoun, 4th Jan. 1757, M. 15,218, B. S. 5. 830.

(*o*) Bankton, 2. 9. 25; Hunter's Landlord and Tenant, 594; Bell, 14th June 1814, F. C.

141. ASSIGNATION TO RENTS.—See above, § 58. 2.

142. ASSIGNATION TO TITLE-DEEDS (*a*).—(1.) This clause does not appear to be of much force. Title-deeds are accessory to the principal right, and must follow the subject conveyed; but the general assignation of writs may occasionally enable a disponer to strengthen his title, by executing open precepts or procuratories (*b*). Where the seller's right stands on an unexecuted disposition, it is in practice specially assigned, and the conveyance is then styled a *disposition and assignation*. (2.) An assignation to writs and titles has not the effect to vest in the disponee rights to which they relate, that are not expressly conveyed, or do not pass as parts and pertinents of the lands. Thus, an assignation of a tack of teinds does not give the disponee the right to the subject of the tack (*c*). (3.) The disposition is no part of the title-deeds until after delivery; and so long as it remains in the hands of the seller in security of the price, he has a preference for the amount over the creditors of the purchaser (*d*). (4.) The title-deeds of a heritable subject cannot be converted into a separate security, except in the anomalous case of being impledged or *hypothecated* to a law-agent for the balance due on his accounts. See *Heritable Bond*. A claim of this nature cannot, however, affect a purchaser, unless through his own neglect. He has a right to possession of the title-deeds before the transaction is closed, and where a right of hypothec exists which the seller cannot discharge, it may be provided for out of the price.

(*a*) AND FARTHER I hereby make and constitute the said B. and his foresaids my cessioners and assignees not only in and to the whole writs titles and securities of the said lands and others made and granted in favour of me or my predecessors and authors and whole clauses therein contained with all that has followed or may be competent to follow thereon for ever; BUT ALSO in and to the rents &c. &c. SUBROGATING hereby and SUBSTITUTING the said B. and his foresaids in my full right and place of the premises for ever.

(*b*) Jur. Styles, 1. 109; Bell's Conv. of Land, p. 69. See Mansfield, 26th May 1835, F. C., 13 S. 832; Renton, 5th Dec. 1837, D.

(*c*) Graham, 15th Dec. 1814, F. C.

(*d*) Baird v. Jap, Aug. 1758, M. 14,156.

143. WARRANDICE OF THE ASSIGNATION. See above, § 59.

144. OBLIGATION AS TO PUBLIC BURDENS.—See above, § 60.

145. CLAUSE OF DELIVERY OF THE TITLES (*a*), &c.—The other clauses of the disposition, being the clause of delivery of the titles—clause of registration in the books of Council and Session, or the books of any other court of record,—precept of sasine, and testing clause, need no comment in this place. As to registration, see *Heritable Bond.*

(*a*) AND I have herewith delivered up to the said B. the title-deeds of the said subjects conform to inventory subscribed by me of this date as relative hereto.

TITLE VIII. SASINE ON THE DISPOSITION.

146. There is nothing peculiar in the form of the instrument of sasine following upon the disposition. As a part of the feudal title, it is essential to vest a right in the purchaser, according to the maxim, *Quod traditionibus non nudis pactis dominia transferuntur*—that property is transferred by delivery, and not by bare agreement. All burdens on, and qualifications of the right, must be expressed according to a rule above explained, (§ 84.)

TITLE IX. CHARTER OF CONFIRMATION.

147. ORIGIN OF CONFIRMATION.—The usual course of practice being to take infeftment on the disposition of sale, it follows that the purchaser's title is, in the general case, ultimately completed by *confirmation.* The form of confirmation is as old as the middle ages, and was employed where succeeding princes acknowledged the grants of their predecessors (*a*), and to restore the right of a vassal or allodial proprietor whose title-deeds had been lost or consumed by fire (*b*). In this island, charters of confirmation were at an early period granted by princes, barons, and prelates as a mark of protection, and by next heirs to exclude all right of challenge.

Such deeds had thus no proper feudal character—in the sense at least in which confirmation is received in Scotland. Charters of confirmation for a feudal purpose appear to have been first introduced among us to mark the superior's approbation of, and consent to sub-infeudation, and their effect was to protect the subvassals against feudal forfeitures incurred by their immediate superiors. It is said that it was not until the counterpart (*c*) of the English statute, *Quia emptores terrarum*, was enacted, that the direct transmission of lands to be held of the disponer's superior was known in our law, resignation being the only mode of divesting the vassal in use before that period. This effect is ascribed to the supposed statute of Rob. I., by an author of much research (*d*), who observes, "Our own writers "upon this subject have supposed that the statute was never "executed in Scotland: it is certain, however, that it was "executed during the remainder of that century, and it is "the genuine source of our precepts of sasine and obligements to infeft *a me et de superiore meo*." But it must be acknowledged that there is much obscurity in the origin of the confirmation by the superior of charters or precepts *a me*. The form may have arisen out of the enactment in the statute of Robert III., that alienation without the *previous licence* of the superior should infer recognition, or the forfeiture of the fee, a notion which is rendered probable by the observation of Balfour (*e*), that lands were saved from recognition by the superior's *subsequent confirmation* of the alienation. It may therefore, perhaps, be assumed, that confirmation by the superior, to which effects so important are now ascribed, was originally the mere expression of consent required by that statute. It is stated, indeed, by a high authority, that the superior's consent or confirmation was originally written on the back of the charter or disposition by the vassal, and that it was not until the stamp laws imposed a duty upon every deed, that the caution of conveyancers induced them to give it a separate form (*f*). This practice was not, however, by any means general (*g*). In Crown holdings, the charter of confirmation was at an early period a distinct writ. Originally, it made no mention of the sasine; and after it be-

came common to take infeftment prior to confirmation, a clause was introduced, declaring the confirmation to be as valid and effectual as if the charter had preceded the infeftment upon the deed confirmed. It is not imperative on the superior, by statute, to enter a disponee by the form of confirmation, but by resignation only, although, the practice being uniform, it is thought that the choice of the particular mode of completing his title would be accorded to the disponee, where the superior could qualify no interest to refuse confirmation. (See *Modes of Entry.*)

(*a*) (*Formæ of Marculfus*, Lib. 1, No. 31, *Leges Barbar.* vol. 2, p. 211.) "Merito regalis clementia in illis conlata munera vel proprietates parentum nostrorum confirmare deliberat quos cognoscit anteriorum Regum parentum nostrorum vel nobis fidem integram conservasse inlesam. Idcirco inluster vir ille chartas præcedentium regum nobis protulit recensendas qualiter parentibus suis loca aliqua fuissent concessa; petiit ut eum de omni corpore facultatis suæ tam quod regio munere ipse vel parentes sui promeruerunt quam quod per venditionis cessionis donationis commutationisque titulum ad præsens juste et rationabiliter est conquisitum et ad præsens possidere videtur per nostrum in ipso deberemus generaliter confirmare præceptum quod nos pro divino intuitu vel ejus meritis compellentibus integra devotione magnitudo vestra præstitisse cognoscat Præcipientes enim ut quicquid ex successione parentum vel ejus voluntate tam munere regio vel per quælibet instrumenta chartarum ad eodem juste pervenit tam in villabus mancipiis ædificiis accolabus aurum argentum speciebus ornamentis mobile et immobile aut quodcunque in quibuslibet rebus per instrumenta chartarum tempore presenti cum rationis ordine dominare videtur per hanc auctoritatem firmatus cum Dei et nostra gratia in integritate hoc valeat possidere et suis posteris auctore Deo derelinquere."

(*b*) (*Formulæ Sirmondi*, No. 27, *Leg. Barb.* 3. 444.) "Merito largitatem Regis munere sublevantur qui ab hostibus vel incendio passi sunt damna vel violentiam Igitur fidelis noster ille clementiæ regni nostri suggessit eo quod ante hos annos exercitus noster aut illius regis vel per negligentiam alicujus hominis in loco nuncupante illo domus suæ vel res quamplures una cum strumenta chartarum tam quod regio numere perceperat, quam et de diversis partibus per venditiones donationes cessiones commutationes adtraxerat vel quicquid in pago illo vel loca nuncupantia illa possiderat incendium fuisset crematum unde relationem sub testificatione bonorum hominum cognovimus recensendam omnes res suas vel strumenta chartarum perisse vel sibi sicut nobis suggessit damna sustinuisse. Præcipientes ergo jubemus ut quicquid memoratus ille sicut usque nunc tam de terris domibus accolabus mancipiis libertinis vineis pratis silvis aquis aquarumq. decursibus vel reliquis quibuscunque beneficiis usque ad præsens cum æquitatis ordine quietus possedit et ita deinceps in jure et dominatione ejus permaneat et per hunc præceptum plenius in Dei nomine circa cum suffultum atque confirmatum absque ullius inquietudine teneat et

" possideat suisque posteris aut cuicunque voluerit ad possidendum derelinquat. " Quam vero auctoritatem propria manu subter roborare decrevimus."

(c) 2 Rob. I. c. 25.

(d) Ross, 2. 257. See Ersk. 2. 7. 8.

(e) Balfour, p. 485, v. *Recognition*, c. 10.

(f) Ersk. 2. 7. 13.

(g) See (in Appendix to Report on Conveyancing, 1838,) Examination of Thomas Richardson, Esq. p. 196.

148. INTRODUCTORY CLAUSE (a).—1. *Epistolary address.*—(1.) The granter of the charter is described by name and designation, such as dwelling-place and occupation, or style and title, according to his rank; and according to the old genuine form, he addresses himself, *To all and sundry to whom these presents shall come, greeting.* But the effect of the deed is not injured by the modern commencement, " *Know all men* " *by these presents.*" As to the superior's title, see *Charter of Resignation.*

2. *Cause of granting or composition.*—In this clause the composition paid by the disponer for an entry is sometimes acknowledged in general terms as in the notes, but the practice is not uniform. (1.) When not restricted in the original charter, (above, § 56. 6,) the superior is entitled to a year's rent of the subject, as a composition, under certain deductions. At an early period, before superiors could be compelled to receive the disponees of their vassals, a purchaser bargained with the superior for an entry, and practice followed the analogy of the statutes (b), which gave him right to *a year's maill as the land is set for the time* as a composition for receiving a creditor-appriser or adjudger. We accordingly find that the statute (c) which enables ordinary disponees to obtain an entry from the superior, makes mention of such fees and casualties only as he is by law entitled to receive. These, after a careful inquiry into the practice, were found to be a year's rent of the subjects, whether houses or lands, " deducting the feu-duties and all public burdens, and likewise all " annual burdens imposed on the lands by consent of the " superior, with all reasonable annual repairs to houses or " other perishable subjects (d)." (2.) Where the superior is not proprietor of the teinds, which form a distinct species of right, and belong in that case to the titular, the real rent suffers a

deduction of a fifth whether the teinds be valued or not (*e*). (3.) Salmon-fishings and grass lands are estimated at the medium rent for the last seven years, and victual rents converted at the current prices in the local markets. (Magis. of Inverness, M. 9300.) (4.) It is not unusual for superiors to give a deduction from the composition legally exigible. A fifth, or even a fourth part is occasionally abated; but no precise rule of practice has been fixed.

3. *Who accounted singular successors.*—(1.) It may be stated as a general rule, that with the exception of a donatar of the Crown, (1584, c. 2; Blair, M. 15,045; D. Gordon, M. 15,050,) all who present themselves to the superior in any other character than that of heir of the last investiture (*f*), whether purchasers or mere gratuitous disponees, must pay the legal composition. Thus, the trust-disponees of a deceased vassal cannot demand an entry except as singular successors, even where the conveyance is partly for the benefit of the heir, and contains no powers of sale (*g*). (2.) It is the character of the applicant, and not the mere form of his title that is the test of the superior's right. Where a vassal conveyed the subject to his heir who sold it after the ancestor's death, and the purchaser attempted to complete a title by means of an assignation from the seller to a charter of resignation proceeding upon the disposition of the deceased, the superior effectually resisted this device to deprive him of the legal composition. It was held by the Court that he must enter the heir by precept of *clare constat*, which as being personal cannot be assigned; but that he might refuse to grant a charter of resignation, except on payment of the sum exigible from a singular successor (*h*). In the like circumstances, a disponee who has an object in completing a public right, must therefore offer the superior the amount of the legal casualty. See below, Art. 4.

4. *Modes of exacting composition.*—(1.) The superior, according to the strict principles of feudal law, cannot force a disponee to take an entry, so long as the fee is full, or in other words, during the lifetime of the vassal last entered and infefted (*i*); and although clauses have been invented for the purpose of introducing an artificial sort of non-entry, they have not, it is believed, been enforced in practice, and their validity has yet to be ascertained; (above, § 51.) But so soon

as the vassal last seised in the lands by the superior dies, his heir may be required to take an entry, as the superior is entitled to have at all times a vassal in the fee; and the right is enforced by raising an action of declaration of non-entry, which marks the precise period when the claim becomes exigible, and transmissible against representatives, and after which the change in the defender's *status* from a disponee to an heir will not affect the claim of the superior (*k*). (2.) Where, however, the vassal had conveyed his right to a third party, the superior may, on the disponer's death, call on the disponee to enter. As the heir is thus not a party interested, it appears to be unnecessary to cite him in the declarator (*l*). It follows that the superior is not bound to recognise the heir of a vassal, who had given a conveyance to a singular successor containing the ordinary feudal clauses, under which he may enforce an entry. Although the heir cannot be compelled by the disponee to enter (*m*), he may lend himself to the disponee's purposes, and such attempts have been known in practice; but as the superior is bound to enter the disponee, the latter it is thought may, on the other hand, be compelled to take an entry. The obligation ought to be mutual; and besides to recognise the heir in such circumstances would enable a singular successor to evade payment of the composition during the heir's lifetime. This case differs widely from that noticed in Art. 3, where the sale is by the heir and not by the ancestor, although there the Court will restrict the heir to the mode of entry appropriate to that character, and interfere to prevent his giving a title to the purchaser, which would enable him to evade payment of the year's rent even on the heir's death. (3.) But the objection is competent only to the superior. So long as the disponee is unentered the superior may validly receive the heir of the disponer; but the right thus acquired by the disponer's heir is defeasible by the public infeftment of the disponee (*n*).

5. *Subfeu-duty the rent.*—(1.) Where lands have been subfeued, the subfeu-duty is the rent in a question with the superior, at least where it was an adequate value at the date of the subaltern grant, and he cannot demand a year's rent of houses built by the subfeuars under a lawful contract to which he is no party (*o*). For a like reason it is indiffe-

rent whether the vassal, in his grants to subvassals, has or has not taxed the entries payable by their singular successors (*p*). (2.) But where the vassal subfeus for an onerous consideration, which does not consist solely in the feu-duty payable by the subvassal, but partly in a grassum or money payment, the superior's composition is measured not by the subfeu-duty alone, but by the subfeu-duty with the addition of the legal interest for one year of the sum so received in name of grassum (*q*). These together are accounted the fair annual value of the subjects in a question with the superior. There is thus no distinction between the yearly returns derived from tenants and subfeuars. To award to the superior the subfeu-duties, would be the same as giving him the full profits of the lands, as extracted from them by the tenants, when let for agricultural purposes.

(*a*) Jurid. Styles, 1. 562. KNOW ALL MEN by these presents that I A. immediate lawful superior of the lands and others under written in consideration of a certain sum of money paid by C. whereof I hereby acknowledge the receipt.

(*b*) 1469, c. 36, above, p.146. 1669, c. 18. Our Sovereign Lord taking to consideration that by several Acts of Parliament and constant practick of the Kingdom there is one year's rent of all lands annualrents or others apprised due and payable to the superior of the said lands and others, before he be holden to enter and infeft the compriser; and that there is the same reason in cases of Adjudications as Apprisings. Therefore his Majesty with advice and consent of the Estates of Parliament STATUTES ORDAINS and DECLARES that the superiours of lands annualrents and others adjudged shall not be holden to grant any charter for infefting the adjudger till such time as he be payed and satisfied of the year's rent of the lands and others adjudged in the same manner as in comprisings; and declares that in all cases adjudications shall be in the like condition with comprisings as to the superiours. See also 1621, c. 6, 7, and 27, and 1672, c. 19, anent adjudications.

(*c*) 20 Geo. II. c. 50, § 12. See *Charter of Resignation*.

(*d*) Aitchison, 14th Feb. 1775, M. 15,060, B. S. 5. 613. See also Anderson *v.* Milne, 25th Nov. 1791, n. r.; Anderson, 30th Nov. 1824, F. C., 3 S. 334.

(*e*) Thomson, 24th Nov. 1825, F. C., 4 S. 224.

(*f*) *Note.*—The question as to the right of a substitute of entail, not the heir of line of the vassal last infeft, to enter *qua* heir, is still undetermined; (above, § 53.) D. of Argyle, 19th Nov. 1795, M. 15,068. See Ersk. 2. 7. 7. But where the entail has been recognised, no composition can be demanded; Lockhart, 10th July 1760, M. 15,047.

(*g*) Grindlay, 18th Jan. 1810, F. C.

(*h*) Mag. of Musselburgh, 21st Feb. 1804, M. 15,038.

(*i*) Ersk. 2. 5. 44; Gardiner, 7th March 1799, M. 15,037. See Gordon *v.* Grant, 29th June 1814, F. C., where it was found that a superior might refuse

to enter a disponee whose author, who held on a personal title, was not entered, unless that author should take an entry also; but the case has not been recognised as authority. See Bell's Princ. 723.

(*k*) Ersk. 2. 5. 40-42; Wallace, 2d March 1836, 14 D. 599.

(*l*) See Mag. of Dundee, 26th June 1829, F. C., 7 S. 801.

(*m*) Dundas, 10th Feb. 1769, M. 15,035.

(*n*) Fullerton, 22d Nov. 1833, F. C., 12 S. 117.

(*o*) Ross, 6th June 1815, F. C., affirmed 24th July 1820.

(*p*) Campbell, 28th June 1832, F. C., 10 S. 734.

(*q*) Campbell, as above.

149. CLAUSE OF CONFIRMATION.—1. *Are general terms sufficient?*—By this clause (*a*), the superior *ratifies, approves and perpetually confirms* the disposition and sasine, which are in correct practice identified by dates, the description of the lands, and the date of registration of the sasine. This is the desirable course to follow; nevertheless it has been held that confirmation in general terms of all writs is effectual (*b*).

2. *Must the sasine be confirmed?*—(1.) It seems to have been assumed in the case referred to in Art. 1, that confirmation in general terms, *prior* to infeftment, would be valid, and we learn from Dallas (*c*), that it was usual in his time to confirm the disposition, "together with the precept of sasine "therein insert, and *instrument of sasine following or to follow* "*thereupon.*" (2.) But the question remains, is special confirmation of the disposition alone feudally sufficient? Perhaps the solution of the question may be obtained, by observing what is really essential in the act of the superior. Craig (*d*) observes, that "neither is the charter which is granted by "one to another," (meaning the charter *a me*, under the old form,) "nor the sasine which follows on it of any force, unless "confirmation is added; since he cannot rightly give sasine "who gives it in virtue of an invalid charter; and both must of "necessity be confirmed; and in this clause *there is a dispen-* "*sation with sasine given by him who could not legally give it.*" From this it follows, perhaps, that not only was the consent of the superior required to the investiture of the new vassal, but his authority essential to legalise infeftment on a charter *a me*. We may hence draw a distinction between the case where sasine had not been given, and that in which it had already followed upon the charter. In the former, it may be deduced

from the authority of Craig, that a charter or disposition *a me* might have been validly confirmed before infeftment, and that mention of the sasine would have been superfluous, as the warrant became thus in effect the precept or warrant of the superior himself: in the latter, it was essential to confirm likewise the sasine, and thus to validate the act of the bailie who had given infeftment on an imperfect warrant. The same inference seems in theory to be deducible from the terms of the modern confirmation; but in practice confirmation before infeftment is unknown. Still it must be admitted that the charter of confirmation does virtually nothing more than supply the consent of the superior to the transmission of the fee, and validate the precept of sasine in the vassal's disposition; an effect which would in all cases have flowed from the enactment of Rob. I., had superiors failed in their pretensions to judge of its application to each individual case. (3.) The charter of confirmation being thus a mere subsidiary or supplemental deed, the superior cannot, by the introduction of a *de præsenti* grant, control the terms of the disposition and authorise infeftment contrary to the tenor of the disponer's precept (*e*).

3. *Confirmation of a base infeftment.*—The effect of confirmation depends wholly on the terms of the obligation to infeft contained in the disposition. By these the precept of sasine is controlled, and according to the nature of that obligation, the infeftment is subaltern, public or indefinite. Thus the terms to infeft by one manner of holding, and that *de me*, if we can conceive such to be employed, would convert the disposition virtually into a feu or blench charter, according to the nature of the reddendo. Confirmation of an infeftment proceeding on a deed of that description is now obsolete. It was employed for protecting the subvassal from forfeitures incurred by his immediate superior, (see § 91,) but not against ordinary casualties (*f*).

4. *Confirmation of an infeftment a me.*—(1.) Where, again, the disposition contains an obligation for infeftment *a me de superiore meo*, which constitutes a public holding, confirmation operates *retro*, that is, backwards to the sasine, which it thus validates from its date; and that although the disponer or

disponee, or both, be dead, and the superiority have been acquired by a singular successor (*g*). The effect of this retroactive operation is to validate not only the title confirmed, but all subsequent precepts of sasine, including precepts of *clare constat* and procuratories of resignation, with the instruments following upon them, although prior in date to the confirmation (*h*). (2.) The effect of an infeftment *a me* being thus suspended until the superior's consent, which is essential to the investing a new vassal with the fee, has been given to the transmission, it follows that before confirmation the disponer is not divested (*i*). The right in the disponee is thus merely personal, and it would appear, may competently be transferred to his heir by general service (*k*).

5. *Confirmation of infeftment on the indefinite precept.* —The general effect of the indefinite infeftment has been explained above, (§ 96, 97.) (1.) The obligation is alternative —to infeft by two manners of holding; one base or *de me*, and the other public or *a me*, to be completed by *resignation or confirmation, or both, the one without prejudice of the other.* These words were awkwardly chosen to express the mode of completing the public infeftment; because, although resignation may be resorted to when a title by confirmation has been informally completed, and *vice versa*, the existence of two sets of titles, one by confirmation and the other by resignation, if they are not destructive of one another, would be at least useless and anomalous. But the words have now received a technical meaning, and they ought, in all instances to be employed without deviation from the prescribed form. (2.) It is thought, however, that an obligation to infeft in general terms, would in ordinary circumstances be interpreted from favour to a *bona fide* disponee, to be alternative. But where one manner of holding only is expressed, and there is thus no room for doubt, a holding *a me* has been held to exclude the other, in circumstances of great hardship to the party (*l*.) (3.) Infeftment on the indefinite precept being regarded as base until confirmation, (see § 97,) the disponee is thus in the meantime protected in competition with other real rights, and confirmation has the same effect, as is explained in Art. 4. with reference to the obligation *a me*. The confirmation de-

fines the holding, and the provisional base infeftment flies off, or is evacuated. The advantages of the indefinite infeftment are thus apparent. It protects the disponee from its date, the completion of his entry with the superior being a matter which depends on his own convenience so long as the seller is alive and the fee thus continues full; and on obtaining a charter of confirmation, his right becomes perfect, and acquires the character of public from the date of the sasine.

6. *Mid-impediment.—(Holding a me.)*—The retroactive effect of confirmation (but in the case only of an infeftment *a me*, so as to produce any practical advantage to a competitor,) may be prevented by what is called a mid-impediment, which consists in any intermediate right by which the disponer is divested of the fee before the disponee has been invested by the validating of his infeftment. (1.) A mid-impediment may be produced by a subsequent infeftment, whether public or indefinite, first confirmed. This was declared by statute (*m*), in regard to Crown titles, but the rule holds at common law (*n*). In a competition of rights completed by confirmation, the preference thus depends upon the dates not of the sasines, but of the completed charters of confirmation; and where the disponer's infeftment is likewise public, but has remained unconfirmed, its confirmation will accresce to the first confirmed of two or more public infeftments proceeding on his precepts, although last in date, notwithstanding that the confirmation of the disponer's right has been obtained for the express purpose of validating another infeftment (*o*). It is thus of importance to fix the precise period at which confirmation takes effect. In charters from the Crown it is the date on which the Great Seal is affixed (*p*), and in those by subject-superiors, that of the delivery of the charter (*q*). (2.) A mid-impediment may be produced by infeftment on a second conveyance by the disponer, with a base or alternative holding completed by sasine before the infeftment on the first conveyance has been validated by confirmation (*r*). In this instance the subsequent confirmation of the first infeftment would operate *retro* to the effect only of perfecting a right of mid-superiority in the person of the first disponee, to whom the second disponee would thus be vassal in the property.

(3.) An adjudication duly feudalised would in similar circumstances produce the same result, to the extent at least of rendering the adjudication a preferable burden on the right of property. (4.) A mid-impediment will be produced by the infeftment of the trustee on a sequestrated estate (*s*). (5.) Where the heir of a disponee infeft upon a disposition *a me* unconfirmed, had taken up the personal and incomplete right by general service, it was held that his discharge and renunciation of the disposition operated as a mid-impediment to prevent the validating of the infeftment by confirmation on the application of a future heir (*t*); but it is perhaps more correct to say, that the heir effectually extinguished the personal or incomplete right. (6.) The exception of mid-impediment is not pleadable by one liable in the warrandice of the first conveyance (*u*).

7. *Mid-impediment—(Alternative holding.)*—The completion of a public right on the indefinite precept may, indeed, according to strict feudal principles, be prevented by mid-impediment, in the circumstances stated in Art. 6, but to the effect only of excluding the disponee from the mid-superiority (*v*). His infeftment in the property is invulnerable, and another disponee obtaining prior confirmation, and thereby holding of the disponer's superior, would become immediate superior of the first disponee in a theoretical *dominium directum* affording no *reddendo*. Such a case, therefore, could hardly occur in practice.

(*a*) Have ratified approved and perpetually confirmed likeas I hereby RATIFY APPROVE and for me my heirs and successors perpetually CONFIRM to and in favour of the said C. his heirs and assignees whomsoever a disposition dated (*the disposition and sasine narrated, and the lands inserted*) or of whatever other dates tenor or contents the said writs may be in the whole heads articles clauses tenor and contents of the same with all that has followed or may be competent to follow thereupon AND I hereby will and grant and for myself and my foresaids DECERN and ORDAIN that this present confirmation is and shall be as valid and sufficient and of as great force strength and effect to all intents and purposes whatsoever as if the writs before confirmed had been word for word ingrossed herein or as if the present confirmation had been made and granted before the taking of the said infeftment Whereanent and with all objections defects or imperfections which can any wise be alleged or proposed against the validity of the said writs hereby confirmed or this confirmation thereof I have dispensed and by these presents for me and my foresaids DISPENSE for ever.

(*b*) Drummond, 17th May 1793, M. 6936; affirmed on ap.

(*c*) Dallas, p. 644. See Bell, Elect. 242.

(*d*) Craig, 2. 4. 18.

(*e*) Grieve, 11th Dec. 1670, M. 3022.

(*f*) Stair, 2. 3. 28; Ersk, 2. 7. 9.

(*g*) Dirleton and Stewart *v. Confirmation*; Stair, 2. 3. 28; Ersk. 2. 7. 15; Johnston, 17th July 1634, M. 3020; Macdowall, 17th Jan. 1793, M. 8807.—Contrary to the opinion of Craig, 2. 4. 19.

(*h*) Henderson, 5th July 1821, F. C.; Lockhart, &c. Nov. 1837, F. C., D.

(*i*) Ersk. 2. 7. 5, 9, 13.

(*k*) Douglas, 10th July 1713, M. 3008.

(*l*) Rowand, 30th June 1824, F. C., 3 S. 196; Peebles, 9th Dec. 1825, F. C., 4 S. 290; Macnair, 16th Feb. 1827, F. C., 5 S. 372. See Struthers, 2d Feb. 1826, F. C., 4 S. 418; affirmed, 2 W. S. 563.

(*m*) 1578, c. 66. *(Excerpt.)*—It is CONCLUDED STATUTE and ORDAINED be our Soveraine Lord and the three Estaites of Parliament quhasaever obtenes or has obtened the first confirmation of ony infeftment either of kirk-lands or uther lands halden of our Soveraine Lord that the first confirmation shall be of avail force and effect and sall prevail to the secund the said infeftment quhilk is first confirmed being valiabil in the selff and lauchfully maid. And in this case the last confirmation sall not be respected albeit the samin confirme the first infeftment bot the first confirmation of the last infeftment sall prevaill to the last confirmation of the first infeftment be way of exception or reply without ony summonds or proces of reduction. It is alwayis providit that gif the principal infeftment first confirmed for ony uther substantial cause by the foresaid confirmation be of nane avail or unlauchfullie maid to the prejudice of ony uther partie havand interest to the landes therein contanit and quha may be excludit be reason of the said first confirmation the said partie havand intres sall be heard to accuse or reduce the said infeftment first confirmed or otherwaies to move action against the samin as accordes of the law quhidder they have obtained confirmation of their infeftment or not.

(*n*) Ersk. 2. 7. 14; La. Polmaise, 12th July 1580, M. 3026.

(*o*) Campbell, 15th Jan. 1663, M. 3008, 3016; Henderson, as above.

(*p*) Ersk. 2. 7. 14.

(*q*) Dalziel, 12th March 1685, B. S. 2. 81.

(*r*) Ersk. 2. 7. 15; Rowand, Struthers, Macnair, as above.

(*s*) Peebles, as above. (*t*) Douglas, as above.

(*u*) Ersk. 2. 7. 15; Harvie, 29th Jan. 1822, F. C.

(*v*) Bell's Conv. of Land, 253 and 292 note.

150. TENENDAS. } These clauses are taken from the
151. REDDENDO. } original charter and need no comment. As a general rule it may be stated, that when any doubt arises in regard to the clauses of a charter by progress, recourse will be had to the original grant, for all the conditions and qualifications of the first investiture are held to be repeated in future charters. (See above, § 55, 56.)

152. CLAUSE SALVO JURE (*a*).—(1.) Superiors are not prejudged in any rights they may have in the *dominium utile* by the granting of charters by progress (*b*). The investiture is renewed, subject to all the claims which attached to it in the person of the vassal last infeft (*c*); but it is nevertheless usual to insert an express reservation of the superior's own rights and the rights of all others. It follows, that the subject of the grant is not warranted by the superior. (2.) As the delivery of a charter by progress presumes the discharge of all prior casualties and duties, these, when resting owing, ought to be expressly reserved.

(*a*) SAVING AND RESERVING the bygone and current feu-duties of the said lands in so far as the same are not paid as well as my own right and the right of all others as accords of the law.

(*b*) B. of Glasgow, 20th March 1635, M. 6516; Forbes, 28th Nov. 1673, M. 6517.

(*c*) Ersk. 2. 7. 21.

153. CLAUSE OF REGISTRATION (*a*).—The registration warranted by this clause is in the books of Council and Session only (*b*). The deed concludes with the ordinary testing clause.

(*a*) above, p. 96.

(*b*) 1693, c. 35; above, p. 100.

TITLE X. CHARTER OF RESIGNATION.

154. INTRODUCTORY REMARKS.—1. *Procuratory for resigning.*—The general nature of the entry by resignation has been explained above, (§ 95.) (1.) It is the opinion of Craig, in which he is followed by Stair, Mackenzie and Erskine (*a*), that the completion of the resignation *in favorem* by the investiture of the new vassal was essential to the divesting the old, "*si pars aliqua non fuerit impleta, totum actum cadere sive re-*" *scindi oportere*;" contrary to the notion entertained by Balfour and Sir T. Hope (*b*). Hence it follows that sasine on a second resignation *in favorem* is preferable to a posterior sasine on the first. (2.) The form of resignation was originally *propriis manibus*; but as this simple method was liable to abuse,

it was enacted (*c*), that when resignation was made by the vassal personally *ad perpetuam remanentiam*, the instrument of resignation should be sealed with the seal of the resigner and be subscribed by him, or if he could not write, by means of a public notary. But when the resigner had previously granted an obligation to infeft the resignatary, it was the opinion of Stair that the seal and subscription of the party to the instrument were unnecessary, although it bore that the ceremony was performed *propriis manibus* (*d*). By the same statute, procuratories of resignation *ad remanentiam* were appointed to be sealed and subscribed in the same manner as instruments of resignation *propriis manibus;* and procuratories *in favorem* became subject to the like rules. (3.) Procuratories *in favorem* are derived by Craig and Ross (*e*) from the *procurationes ad resignandum in favorem*, employed by churchmen in transmitting rights to benefices; and according to the latter author, they are the "most habile, simple and complete mode of trans-"mission of land property." The instrument of resignation *in favorem* taken upon the fact was originally of use as evidence of the superior's acceptance of the resignation, and to ground proceedings for compelling him to invest the resignatary; but it is now obsolete in ordinary practice; and in completing a Crown title, although the act or ceremony of resignation be still performed, an instrument is but rarely extended. (4.) The possession of a procuratory of resignation conferring a right on the disponee to enforce an entry with the superior (*f*), forms the immediate warrant of the charter of resignation, the ceremony, although still described in the charter, being purely imaginary. Hence it follows that a procuratory of resignation is a valid deed of transmission (*g*); and it is common in practice to frame deeds of entail in this form. Care ought to be taken to use the words of style, as the omission even of such terms as can be supplied by the context may give rise to vexatious questions (*h*).

2. *Title of the superior.*—(1.) The rule is strictly enforced in practice, that the superior's title shall be completed before the vassal accepts a charter by progress or a precept of *clare constat*. The question, whether a grant by progress *a non habente potestatem*, by a superior holding a personal right,

is absolutely null, or capable of being validated by the subsequent infeftment of the superior, does not appear to have as yet been deliberately discussed, and a situation which might give rise to it is not of probable occurrence. A party is by no means likely to conclude a transaction so loosely as to accept of a charter from a superior who has not in his own person a feudal title to the lands. It might occasionally happen, however, to be convenient for an heir or a creditor to obtain a precept of *clare constat* or a charter of adjudication without waiting for the superior's infeftment. (2.) Although a superior is bound, under a severe sanction, to enter with the oversuperior in order that he may be enabled to grant a valid entry to the vassal (*i*), it does not appear to be in express terms laid down by any author that the maxim, *jus superveniens auctori accrescit successori*, would fail in the case supposed. That maxim, as founded on the obligation of warrandice, although originally applied to supervenient *rights*, has since the time of Stair been extended to supervenient *titles*, for he alludes to it merely as a common opinion, that the subsequent infeftment of the granter of a disposition would accresce to the infeftment of the disponee (*k*). This extension appears accordingly to have been with difficulty admitted (*l*); but the principle was afterwards applied to double rights, to the effect of validating the first completed infeftment, upon the fiction that the disponer's title, when perfected, drew back to the infeftment first in date, provided that the right had not in the meantime been carried off by the diligence of creditors, or, if personal, conveyed to and feudalised by another disponee (*m*). To have admitted the application of the maxim in any circumstances to an originally invalid infeftment implies a disregard of the feudal rule, that none can give a warrant for investing another with a fee but a party who is himself feudally invested, when opposed to the equitable principle founded upon the obligation of warrandice; and if it is admitted that the operation of that principle may supersede the feudal rules in one instance, there seems nothing to prevent its extension to other cases which substantially fall within its scope. Confirmation and resignation are forms not more exclusively confined to a feudalised superiority by the notions of the older feudists,

than infeftment; and indeed, in an early case, it seems not to have been doubted that where warrandice operated, the principle would apply to a charter by progress; and it appears to have been assumed in a later instance, that a charter of confirmation was capable of being validated *jure superveniente* (*n*). Entry by precept of *clare constat*, again, does not even in form differ from the granting of a precept to a vassal or disponee. It may thus perhaps be considered as not a settled point that an entry by a superior uninfeft is absolutely null. (3.) Where the right of the superior is radically defective, the infeftment of the vassal under his precept will be inept, and the deeds of the vassal under such infeftment invalid. Much inconvenience may thus be caused by applying to the wrong superior; and it is not clear that the loss so occasioned would be laid on the pretended superior, unless the entry had been taken on his own requisition (*o*). (4.) A party who has disponed his right continues superior, in a question with the vassal, until he has been divested by the public infeftment of the disponee. The vassal cannot, therefore, proceed against such disponee under the statute of 1474, (below, Art. 3,) until he has been entered by the disponer's superior, either by resignation, or the confirmation of his infeftment on the disposition. The proceedings must be directed against the disponer or his heir (*p*).

3. *Mode of enforcing an entry.*—(1.) When the superior's title is complete, and an entry is refused, the disponee will have recourse to the statute of George II., which confers a right to enforce an entry on tender of the superior's legal claims; and when the parties are not at one as to the extent of these claims, the questions between them may be discussed in a suspension at the superior's instance. It is incompetent for the superior to found upon the terms of the destination in the original grant, or a clause of return in his own favour, which is merely equivalent to a simple destination, as a ground for refusing a charter to a disponee, *and his heirs and successors whomsoever* (*q*). (2.) But should the superior be uninfeft and refuse to enter with the over-superior, recourse must be had to the provisions of the statute of 1474, which practice has extended to disponees (*r*). (See *Precept of Clare Constat.*) A refusal of that nature may, it is probable, become not in-

frequent from the operation of circumstances which have but recently come into existence, and the attention of lawyers and practical conveyancers has already been drawn to the subject (*s*). The abolition of the old system of freehold votes, which formed nearly the entire value of the rights of superiority to which they were attached, has removed the chief, in some instances the only, inducement which these voter-superiors had to complete their titles. Still in a feudal sense the right must continue to exist until removed from the feudal chain, and this can be effectually done, under the present state of the law, only by means of resignation *ad remanentiam*, combined with other forms of a complex and burdensome nature, (see *Modes of Entry*,) the remedy of the statute of 1474 being only temporary. It may therefore be advisable that the Legislature should be called on to interfere for the relief of the vassals of such merely nominal mid-superiorities.

4. *Of the charter.*—The charter of resignation is warranted by the procuratory, and cannot go beyond its terms. (1.) It is a rule now well established that a superior, although he may grant the subject of new, (called by *novodamus*,) cannot alter the terms of the original grant, unless to the extent warranted by the vassal; and his consent must be evidenced by a procuratory of resignation, when this form of transmission is employed (*t*). (2.) The charter of resignation is plainly a mere amplification of the original *breve testatum*, suited to the altered circumstances of society, and which it is not now in the power of superiors to refuse. It is to all intents and purposes a renewal of the grant as it stood in the person of the vassal at the time of his making the procuratory, and it expresses the *will* of the vassal and only the *concurrence* of the superior. Thus, the intermediate acts of the resigner or the resignatary, or person in whose favour the procuratory is conceived, cannot obtain effect, unless they are brought feudally under the notice of the superior by a new or supplementary warrant or conveyance. (3.) There seems to be no informality in including two sets of subjects contained in different conveyances in a single charter; but great care is necessary in the preparation of the deed, so as to warrant the

application of the rule of construction, *applicare singula singulis* (*u*).

(*a*) Craig, 3. 1. 17; Mack. 2. 7. 17; Ersk. 2. 7. 23, 24; Stair, 3. 2. 12. See Purves, 14th Nov. 1677, M. 6890.

(*b*) Balfour, *Alienation and Infeftment*, c. 13; Hope's M. Pr. § 161.

(*c*) 1555, c. 38; 1563, c. 81.

(*d*) Stair, 2. 11. 3.

(*e*) Craig, 3. 1. 14; Ross, 2. 244-5.

(*f*) 20 Geo. II. c. 50. See below, note (*q*). See Ross, 2. 303.

(*g*) See Ross, 2. 226.

(*h*) See Monro, 15th Feb. 1826, F. C., 4 S. 467, affirmed, 3 W. S. 344.

(*i*) 1474, c. 57, as below. See Craig, 2. 12. 34; Stair, 3. 5. 46, *et seq.*; Ersk. 3. 8. 80; Bell's Princ. 881-2; Dirleton and Stewart, *v. Jus superveniens.*

(*k*) Stair, 3. 2. 2.

(*l*) See Tenants of Kilchattan, 16th Jan. 1663, M. 1259.

(*m*) See Neilson, 22d Dec. 1738, M. 7773; Paterson, 10th Dec. 1742, M. 7775; Henderson, 5th July 1821, F. C.

(*n*) See Town of Musselburgh, 22d Dec. 1675, M. 7759; Redfearn, 7th March 1816, F. C.

(*o*) See Syme, 16th June 1801, M. App. *v. Sup. and Vas.* 3; More's Notes on Stair, cciii.

(*p*) Christie, 14th Dec. 1776, 5 B. S. 608.

(*q*) 20 Geo. II. c. 50, § 12. "Whereas the methods of procuring entry by "heirs or singular successors or purchasers of lands in Scotland that are held "of subject-superiors heretofore practised are tedious and expensive" "it "shall and may be lawful and competent for any person who shall be duly served "and retoured heir to any of his predecessors in any lands or heritages in "Scotland or to any person who shall purchase or acquire such lands or heri-"tages from the former proprietor or vassal who was duly vested and seased "therein and who shall obtain from such vender or former proprietor a dispo-"sition or conveyance containing a procuratory of resignation in favour of such "purchaser or disponee to apply to the Ordinary on the Bills in the Court of "Session praying a warrant for letters of horning to charge the superior of "whom such lands or heritages were respectively held to receive or grant new "infeftment to such heir or purchaser respectively and upon production to the "Lords of Session of a special retour of the petitioner or party applying in "any such lands or heritages or upon production of a disposition or convey-"ance bearing a procuratory of resignation in favour of such petitioner it shall "and may be lawful for the said Lords of Session and they are hereby autho-"rised and required to grant warrant for letters of horning on fifteen days to "charge the superior or superiors in the lands contained in such special retour "or procuratory of resignation to receive or grant new infeftment to such heir "purchaser or disponee respectively." By § 13. it is enacted, that the superior shall not be bound to give obedience unless upon tender "of such fees and "casualties as he is by law entitled to receive upon entry of such heir or pur-"chaser." See Jurid. Styles, 3. 689; Magistrates of Aberdeen, 17th June 1808, M. App. *Sup. and Vas.* 4; Johnston, 31st July 1759, M. 4356.

(*r*) 1474, c. 57. *Item*, It is statute and ordained anent overlords that in

defraud and skaith of their vassals and tenants differes to enter to their lands and superiorities that in time to cum the saids overlords sall enter to their lands and superiorities and do their diligence thereto but defraud or guile within forty days after that they be required by their vassals and tenants. The quhilk if they do not the said vassals and tenants incontinent thereafter to be entered by the King or the overlord that the superioritie is halden of and hald of him and the other overlord that fraudfullie differrit his entry to tyne his tenant for his lifetime and assith the partie of his costs and skaiths that shall be sustained throw him in default of his entry. See Spalding, 8th July 1709, M. 15,033; Dickson, 1st July 1802, M. 15,024.

(*s*) See Report of Law Commission on *Conveyancing*, (1838,) p. 7, and evidence; in particular, Examination of Robert Forsyth, Esq. p. 200.

(*t*) Craig, 3. 1. 14, *et seq.*; Stair, 2. 2. 8; Ersk. 2. 7. 18; Landales, 12th June 1752, M. 14,465, Elch. *Serv. of Heirs*, 6.

(*u*) See Bontine, 12th June 1835, F. C., 13 S. 905.

155. CLAUSES OF THE CHARTER.—The clauses of the charter of resignation are nine in number; the *introductory*, *dispositive*, *quæquidem*, *tenendas*, *reddendo*, *precept of sasine*, *registration*, *salvo jure cujuslibet* and *testing clauses*. It is necessary to comment on those clauses only in which this charter differs from the charter of confirmation.

156. DISPOSITIVE CLAUSE (*a*).—(1.) This clause contains the lands as described in the disposition, or in the procuratory of resignation when executed in a separate form, with the burdens constituted in favour of the superior. It was at an early period a common device with vassals to obtain charters upon their own resignations, in order to extend the descriptions of the lands. This was put a stop to by an express statute, which declares, that infeftment passed upon the resignation of the vassal *shall work no prejudice anent the bounds or marches either in property or commonty to any other person* (*b*). (2.) It is usually conceived in favour of the vassal, *his heirs and assignees*, and the charter may thus become the warrant for infefting a purchaser from the vassal. The late Mr Bell (*c*) is of opinion, that the terms of the clause, as regards the conveyance to assignees, do not correspond with what was held to be the original nature of the deed, and he objects to the introduction of that term; but his objections appear to be founded solely on the facility which the form in ordinary use affords to the vassal of disappointing the superior of his com-

position, by assigning the unexecuted or open precept to a purchaser. The law seems, however, to have provided sufficient checks against a device of that description (*d*), which can at any rate be seldom employed to the injury of the superior, who cannot demand a year's rent on every transmission, but only upon the death of an entered vassal (*e*). If one assignee is a better life than the party named in the charter, another may have a shorter tenure of existence; so that the objection does not appear to be worthy of a moment's consideration when balanced against the inconvenience and expense which would be occasioned by restricting the precept in the charter of resignation to the immediate grantee.

(*a*) This clause does not differ from the form in the original charter or the disposition of sale. See above, p. 191.

(*b*) 1592, c. 138; Tillicoultry, 5th Dec. 1701, M. 12,743.

(*c*) Bell's Conv. 265.

(*d*) See above, § 148. 3, 4.

(*e*) Last refer.; Gordon, 29th June 1814, F. C., has not been considered as well decided.

157. QUÆQUIDEM (*a*).—The name is taken from the first word in the Latin form. This clause contains the *modus vacandi*, or deduction of the titles of the subjects since the infeftment in favour of the seller or his author, and a description of the imaginary ceremony of resignation. In place of a false narrative, the clause ought to set forth the date of the procuratory of resignation, and that in virtue thereof the superior had, under the statute, been required to execute a charter in favour of the holder of the procuratory.

(*a*) WHICH LANDS and others before disponed formerly pertained heritably to D. holden by him of me as immediate lawful superior thereof and were with all right title and interest which the said D. had or anywise might have claim or pretend thereto duly and lawfully resigned by him and his procurators in his name to that effect specially constituted by virtue of the procuratory of resignation contained in a disposition of the said lands and others dated
made and granted by the said D. in favour of the said E. in the hands of me the said A. as immediate lawful superior thereof purely and simply by staff and baton as use is IN FAVOUR and for new infeftment of the same to be made and granted to the said E. and his foresaids heritably and irredeemably in due and competent form; as authentic instruments taken upon the said resignation of the date hereof more fully bear.

158. PRECEPT OF SASINE.—Reference is made to § 62.

159. INSTRUMENT OF SASINE.—1. *Form.*—By the statute of 1693 (*a*), it is provided that procuratories of resignation, as well as precepts of sasine, may be executed after the death of the parties in whose favour they are made, or their authors, provided *the instruments of resignation and sasines taken after the death of either party express the titles of those in whose favour the resignation is made, and to whom the sasine is granted, and that the same be deduced therein; otherwise to be void and null.* As it is probable that the statute was intended to refer to instruments of resignation *ad remanentiam* only, since those *in favorem* do not enter the register of sasines, it might perhaps be maintained that the enactment comprehends instruments of sasine upon charters of resignation, as instruments virtually authorised by and proceeding upon the procuratories which warrant the charters. The object of the Legislature may, indeed, be presumed to have been a connected series of deeds entering the register, from which third parties could discover the course of titles by which heritage had been transmitted from one proprietor to another; but, as the enactment is penal, it will not perhaps be extended beyond its strict letter, which does not mention the sasines in question. It seems, however, an advisable precaution to transfer the *quæquidem* of the charter to the instrument of sasine, in the circumstances to which the statute applies.

2. *Effects of sasine upon the charter.*—Infeftment upon the charter of resignation makes the purchaser the vassal of the seller's superior, his right being subject however to all the burdens with which it was charged prior to the resignation (*b*). A title completed by disposition, charter of resignation and sasine, (provided infeftment has not been taken on the precept in the disposition,) is therefore equivalent to that made up by disposition, sasine and charter of confirmation, with this only difference in favour of the former method, that the charter of resignation and sasine form a good prescriptive title; an advantage which the sasine and charter of confirmation do not possess without the disposition. It must, however, be conceded, that the security obtained by imme-

diate infeftment on the indefinite precept in the disposition far more than counterbalances any advantage which may be supposed to attend the greater simplicity or feudal propriety of the form by resignation; whence it has resulted, that the entry by resignation is comparatively rare in practice.

(*a*) 1693, c. 35; above, p. 100.
(*b*) Erak. 2. 7. 21.

TITLE XI. UNION OF RESIGNATION AND CONFIRMATION.

160. COMBINATION OF THE TWO CHARTERS.—(1.) It follows, from the nature and effect of infeftment upon the indefinite precept, which makes the purchaser in the meantime vassal to the seller, that he may convey to a third party, so as to authorise infeftment which is immediately valid, before he has himself entered with the seller's superior. Such transmissions may proceed without limit, each future disponee being the vassal of his immediate author. From the doctrine of confirmation it is plain, however, that all these infeftments may be made public, and this is effected in practice by a single charter. The fiction of law is, that the first infeftment becomes by the confirmation public from the date of the sasine, and validates the double precept in the second disposition, and so on through the course of conveyances. (2.) Where such transmissions have occurred, the last disponee, if he have not taken infeftment, may complete his title by means of a combination of the charters of confirmation and resignation. Upon the principle now explained, the confirmation of any number of indefinite infeftments makes the rights public from the dates of the several sasines, and the resignation proceeds upon the procuratory in the last disposition of the series, on which, by the supposition infeftment has not been given, that procuratory being validated by the character of public conferred by the confirmation on the immediately preceding infeftment (*a*). (3.) It is obvious that the same result would follow were the several rights not indefinite, but *a me*, from the commencement. (4.) On the other hand, were the several precepts *de me* only, the rights must continue base, so many

separate fees being created as there are dispositions and sasines, sellers and purchasers. This last case is given merely for the sake of illustration. Disposition is not the ordinary form of constituting subaltern rights.

(*a*) Bell's Conv. 294.

TITLE XII. CONSOLIDATION.

161. MEANING OF THE TERM.—In the cases supposed in § 160, with the exception of the last, there is no fee permanently constituted, the base-holding, created provisionally by infeftment on the indefinite precept, being evacuated by subsequent confirmation. But a variety of situations may occur where the property and superiority have been permanently disjoined, although the great source of such separations, the constitution of freehold votes, no longer exists. For example, a vassal may acquire the superiority, or a superior the property, by purchase, succession or adjudication for debt; or a base fee may be constituted through mistake, by inserting an obligation to infeft *de me* only in a disposition of sale. In these cases the two fees will remain divided until formally united or *consolidated* by means of resignation *ad remanentiam.*

162. OLD DOCTRINE.—The necessity for consolidation by express deed did not always exist. At an early period of the feudal law, fees were, with little ceremony, renounced or resigned by the vassal, and became thereupon incorporated with the more eminent right of superiority. In the course of time, the notion was received, that a fee could only be restored by the vassal to his superior, and consolidated with the superiority by a formal instrument of resignation *ad remanentiam.* Resignation of this kind, as we learn from Craig (*a*), was made in the hands of the superior, "*in solius domini favorem* "*et commodum ut feudi proprietas integra ad dominum redeat* "*et ad perpetuum remaneat, sic ut dominium utile cum directo* "*consolidetur.*" We find, accordingly, that no difficulty arose when the vassal acquired the superiority, or the property

came to the superior directly from the vassal. Both completed their titles to the undivided fee by resignation *ad remanentiam*. Thus, Lord Stair observes, that if the vassal become heir or singular successor to the superior, he might, on being infeft in the superiority, "resign to himself as superior *ad remanentiam* (*b*)." It was only when the superior acquired the *dominium utile*, by succession or adjudication, that the necessity arose for holding that the subaltern fee was *ipso jure* incorporated with the more eminent, because, in neither of these cases could a party, in accordance with the notions prevalent at the time, give warrant for his own infeftment (*c*). But when the uses of the registers became more apparent, it was seen that a fee which had left its traces on the record, could not be extinguished by the mere fact of the superior obtaining an incomplete right to it; *e. g.* by service as heir in special to the vassal when he acquired the property by succession, and thereupon obtaining a decree of declarator of consolidation. It thus came gradually to be held, that in order to the consolidation of the two fees, the superior must be infeft in both, and it was at length determined that he might grant precepts for his own infeftment (*d*). Thus, the *dominium utile*, which, according to the prevailing notions, was a mere burden on the right of superiority, seems to have been considered as extinguished *confusione*.

(*a*) Craig, 3. 1. 6.

(*b*) Stair, 2. 11. 8.

(*c*) B. supplicant, 21st June 1634, M. 6917; Elies, 23d July 1687, M. 3086; Stair, as above; Dirleton and Stewart, *v. Consolidation*.

(*d*) Morton, 26th Nov. 1668, M. 6917; Stair, as above; Porteous *v.* Bell, 28th Feb. 1757, noticed in Bell's Conv. p. 328; Dallas, p. 567; also, 888-9, where a curious example is given of consolidation by means of a service.

163. MODERN DOCTRINE.—(1.) The notion of consolidation by the superior's infeftment in the two fees became inconvenient in practice. Thus, a superior might acquire right to his vassal's fee, by a destination different from that which regulated the superiority, so that on his death, the property and superiority might, consistently with the doctrine of *confusio* (*a*), have come to be again divided. And unless it had been held that a separation would in certain circumstances

take place, a strict entail must have been evacuated, when the right to entailed lands fell by succession to a superior who possessed the superiority in fee-simple. (2.) But the modern doctrine was received by slow degrees. It was probably influenced by the doubts thrown out by Dirleton, and the opposing opinions of Stewart (*b*), with regard to the *ipso jure* effect of consolidation on the one hand, and the best mode of practically meeting the difficulties of particular cases on the other. At the same time, the sanction by the Court of the superior's exercise of the power of infefting himself opened the best and most simple course for solving all difficulties, and the analogy of the mode of consolidation, when the superior acquired a right directly from the vassal, could not be overlooked. Conveyancers came thus to entertain the opinion, that the two fees of property and superiority were distinct estates, and practice alone seems to have introduced resignation *ad remanentiam* as the valid mode of effecting consolidation. And the Court, on the question occurring for their decision, gave their concurrence in the views of the profession (*c*).

(*a*) See Ersk. 3. 4. 27.
(*b*) Dirleton and Stewart, *voce Consolidation.*
(*c*) Bald, 8th March 1786, M. 15,084, affirmed on ap.

164. EXCEPTIONS.—1. *By prescription.*—An exception to the general rule is founded on the effect of the positive prescription. The title to the superiority being a good prescriptive title to the lands (§ 124,) possession for forty years excludes the right of the vassal. Consolidation by prescription takes place even where the two fees are in one person (*a*).

2. *Right in trust.*—It may perhaps be doubted if a subaltern fee, constituted in the form of a trust conveyance, requires resignation *ad remanentiam* for its extinction. Where the reversion is not conveyed to another, the feudal title is held to remain in the person of the truster, even as regards the property, which is not only adjudgeable by creditors, but capable of being settled by deed of entail. The trust right may therefore perhaps be considered as a mere burden on the radical infeftment in the person of the truster (*b*).

3. *Resignation after infeftment on indefinite precept.*—

The late Mr Bell (*c*) adduces a supposed exception, which, if admitted, would produce the most important effects, by not only destroying the security of the indefinite infeftment, but extinguishing a real right without any operation which would appear on the register. He maintains in substance that resignation on the procuratory in the disposition of sale, after infeftment on the indefinite precept in the same deed, evacuates the base fee created provisionally by such infeftment, in like manner as is done by confirmation. This notion is founded on an observation of Stair's (*d*), that where a purchaser has taken infeftment on a precept to be holden of the disponer, "so soon as he obtains infeftment from the disponer's "superior, the infeftment holden of the disponer becomes "void, *seeing the same fee cannot at the same time be holden "of different superiors.*" These concluding words solve the whole difficulty. At the period when that opinion was expressed, the doctrine of *ipso jure* consolidation prevented the co-existence of two fees in one and the same individual. But to admit the notion in modern conveyancing would have the effect of enabling a seller to defeat the indefinite infeftment of the purchaser at any time prior to confirmation, by granting a procuratory of resignation to a second disponee, the right thus produced, when completed by charter and sasine, evacuating or rendering void the provisional base infeftment in the person of the first disponee, for to consider this result if truly flowing from resignation to be limited to resignation by the first disponee, would be contrary to all principle. The effects of confirmation and resignation in completing the title of a disponee essentially differ. Infeftment on the indefinite precept is alternative; the disponee may render it public at his pleasure; and being alternative, it follows, that when made public by confirmation, the base fee is necessarily evacuated, unless there has been a mid-impediment to prevent the effect of the confirmation. And accordingly it has never been doubted, that such mid-impediment leaves unaffected the base infeftment in the person of the first disponee. The notion of Mr Bell seems therefore to be contrary to feudal principle, and it has received no countenance from practice. The decided cases, so far as they go, are to the same purport. Thus,

where a party had expede the anomalous title of a charter of resignation and confirmation, *after* infeftment on the indefinite precept on the last of a series of dispositions, it was not considered that the base fee was evacuated, although it was held that the resignation, as perfected by the act of resigning, was the ruling branch of the charter, and carried right to the superiority. On the contrary, it was in one instance observed, that the resignation was not inconsistent with confirmation of the prior infeftment on the disposition, *as a base right* (*e*). It appears, indeed, that a base fee may be produced by infeftment on the indefinite precept, even *after* a charter of resignation has passed upon the procuratory in the same disposition, if taken *before* infeftment on the charter, and that it will subsist after such infeftment until extinguished by resignation *ad remanentiam* (*f*).

(*a*) Grieve *v.* Walker, 27th Feb. 1827, F. C., 5 S. 469. This case was decided upon the authority of Bruce Carstairs, 6th Dec. 1770, M. 10,805;—but the latter appears to have been determined upon the express ground, that the property being held on a limited title, was worked off by possession for forty years upon the title to the superiority, which was unlimited; a rule well recognised where the titles are of that distinct nature, but rejected when they are both unlimited; (see Zuille, 4th March 1813, F. C., which contains all the authorities.) Nor can the subaltern right be held to be extinguished by the negative prescription, as it is a right of property and not a mere burden. If the effect is therefore to be imputed to the operation of the positive prescription, it would follow that the rule, in cases of two unlimited titles, deserves reconsideration, as it is difficult to perceive any real distinction between such cases and the case of Grieve;—Elibank, 21st Nov. 1833, F. C., 12 S. 74; Bontine, 2d March 1837, 15 D. 711.

(*b*) Macmillan, 4th March 1831, F. C., 9 S. 551; affirmed, 28th June 1832.

(*c*) Bell's Conv. 344, 3d edit.; but see note.

(*d*) Stair, App. § 1. See Brodie's edit. p. 833.

(*e*) Campbell, 4th Jan. 1754, 5 B. S. 809; Stewart, 20th Feb. 1827, F. C., (p. 368 of vol.) 5 S. 383.

(*f*) See Grant, 22d Feb. 1760 M. 8740. There is here a remarkable example of the creation and after-extinction of a base fee for the purpose of splitting the property and superiority, and creating a vote under the old system of voting.

TITLE XIII MODES OF ENTRY.

165. SELLER ENTERED.—The nature and effect of the feudal forms of resignation and confirmation may be illustrated

by some practical examples of their application. In this, the simplest of cases, the seller grants a disposition in the ordinary form, on which the purchaser may complete his title by infeftment on the indefinite precept, followed by charter of confirmation; or by charter of resignation and sasine. The former method is that employed by all conveyancers who study the absolute security of their employers, and is consequently the form most general in practice.

166. SELLER INFEFT, BUT NOT ENTERED.—When the seller's title stands on a sasine proceeding on a disposition of sale, unconfirmed by the superior, he grants to the purchaser a disposition of the usual tenor. In this shape of the title, the purchaser may enter in either of two modes, viz. by infeftment followed by charter of confirmation of the two dispositions and sasines; or by a combination of confirmation and resignation, and sasine on the charter. In the former case, confirmation completes the title. In the latter, confirmation is granted of the seller's infeftment; and the resignation proceeds on the procuratory (not in the disposition in favour of the seller, but) in the disposition by the seller to the purchaser, which is held to be validated by the confirmation making the seller's own infeftment public from its date. The title is thus completed by sasine on the charter, which, as being a charter of resignation as well as confirmation, contains a precept for that purpose.

167. SELLER NOT INFEFT.—(1.) But if the seller's right is personal, that is, if he holds a disposition with precept and procuratory unexecuted, he will, in his disposition to the purchaser, assign that disposition with its feudal clauses, and the purchaser will proceed as in § 165, care being taken to deduce the title in the instrument of sasine when either the seller or his author has died before infeftment. In that event the deduction is essential (*a*), but in all cases it is customary. (2.) With reference to this state of the seller's title, the important question occurs, what right an assignation by one having a personal right only confers on the assignee. It has now for a century been settled (*b*), that

the assignee's right is defeasible until completed by infeftment, and may be excluded or rendered void by a second assignation, or by adjudication led against the cedent followed by the first infeftment. This determination took place in a competition between the assignee to a decree of sale, who had delayed his infeftment, and an adjudger from the cedent whose adjudication was first made real by sasine, the Court, after very full discussion, disregarding the authority of prior cases (*c*), and preferring the adjudger. The reasoning on the part of the successful competitor is conclusive, and shews with much force the dangers that would beset our land-rights were the first conveyance of a personal right, itself remaining personal, to denude the cedent, without leaving any trace by which it could be discovered from the registers.

(*a*) 1693, c. 35. See above, p. 100.
(*b*) Bell, 22d June 1737, M. 2848, Elch. *v. Competition*, 3.
(*c*) Rule, 8th Dec. 1710, M. 2844; Erskine, 9th Dec. 1710, M. 2846.

168. PURCHASER DYING UNINFEFT.—It may happen that the purchaser dies without taking infeftment on the disposition. His heir, after taking up the personal right by general service, will proceed as in § 165, taking care to narrate the service in his sasine.

169. PURCHASER DYING UNENTERED.—(1.) When, however, the purchaser has died after taking infeftment on the disposition, but without having entered with the superior, his heir may complete a title by charter of confirmation and precept of *clare constat*, if the holding is of a subject-superior; the confirmation rendering public his ancestor's infeftment, and the precept warranting the heir's infeftment in that character. (See *Precept of Clare Constat.*) (2.) But where the Sovereign is superior, since the Crown officers can only act upon the evidence of a service, the mode of procedure is different. The heir must in these circumstances take up, by general service, the unexecuted procuratory of resignation in the disposition on which the ancestor was infeft, and thereupon obtain a charter of resignation, the sasine on which, by evacuating the mid-fee which remained in the person of the granter of the disposition, will make the heir vassal of the

Crown in a mid-superiority, and superior of the base fee constituted by the ancestor's infeftment. In order to complete the title, he will then grant a precept of *clare constat* in his own favour, as heir to the deceased in the base right, after infeftment on which he will resign in his own hands *ad remanentiam*, and thus consolidate the two fees. (3.) The late Mr Bell (*a*) suggests another method of completing the title, viz. by obtaining a charter of confirmation of the ancestor's infeftment, and thereafter serving in special to him, and taking infeftment on a Crown precept. This form, it is believed, is now unknown in practice, and it has been objected to on principle (*b*), but, as it humbly appears to the author, without just grounds. It has been maintained, *first*, that confirmation cannot competently be granted unless to a party alive. But, it will be observed, that by a charter of confirmation there is no conveyance made to any party as disponee; a mere ratification is granted of an antecedent step in the progress of titles. It has accordingly been held, (above, § 149. 4,) that confirmation may validly be granted of the infeftment of a party deceased; and it is plainly immaterial in point of principle, whether it be so granted in a charter which likewise confirms an infeftment taken by the person applying for the confirmation, as is done in the daily practice of conveyancers, or in a separate form. It will be observed, moreover, that confirmation is given not merely *to*, but likewise *in favour of* a party; and there appears to be nothing incongruous in granting confirmation, in favour of an heir, of his ancestor's infeftment. It has been maintained, *secondly*, that an heir cannot obtain a Crown charter without service. This is, perhaps, the more formidable objection of the two; but it is competent only to the officers of the Crown, and does not affect the principle. It is, however, undoubted, that the Crown officers were, at a period not far distant, in the practice of passing such charters; and in one instance, an infeftment confirmed after the ancestor's death was sustained as a good title for the enrolment of the heir as a freehold-voter on his right of apparency (*c*).

(*a*) Bell's Conv. 3d edit, 360.

(*b*) Note by editor of third edition of Bell's Conv. p. 360.

(*c*) Macdowall, 19th Jan. 1793, M. 8807.

170. SUPERIOR ACQUIRING THE PROPERTY.—A superior may acquire the *dominium utile* by purchase or succession. (1.) If by purchase, he receives from the vassal a procuratory of resignation *ad remanentiam*, the instrument on which, when duly registered in the register of sasines, effects the consolidation of the two fees by extinguishing the right of property. (2.) When, on the other hand, the property is acquired by succession, the superior grants a precept of *clare constat* to himself as heir to the vassal deceased; and, after completing his entry as such by sasine, he executes in his own favour a procuratory for resignation *ad remanentiam*, which is completed as above. See *Resig. ad Rem.*

171. VASSAL ACQUIRING THE SUPERIORITY.—When the vassal purchases or succeeds to the *dominium directum*, he will proceed as follows: (1.) If he acquires by purchase, he will obtain a disposition framed as above mentioned, (§ 138. 5,) which, although usually containing but one manner of holding, and that *a me*, may, it is thought, be validly expressed alternatively. He will then complete his title to the superiority by confirmation or resignation, as in § 165, and being thus proprietor or *dominus* of both fees, consolidation will be effected as in § 170. (2.) If, again, he acquires by succession to a party entered, the title will be completed, in a Crown holding, by special service, precept from Chancery and sasine, and in a subaltern holding, by precept of *clare constat* and sasine; but if to one having a personal right only, the title will be completed as in § 168. Finally, the two fees will be consolidated by resignation *ad remanentiam*.

172. SELLER IN APPARENCY.—(1.) When a seller possesses as an heir-apparent, he may competently grant a disposition to a purchaser, on which the latter may immediately make up a title, and the title of the heir, when perfected, will accresce to it; (§ 138. 2.) This accretion cannot be impeded by any device on the part of a future disponee, provided the title of the heir is completed during his lifetime, even although it should be expeded by a competitor for the purpose of validating a second or subsequent infeftment. The heir's infeftment

draws back, *fictione juris*, to the right first completed, and consequently to that on which the first sasine is registered (*a*). (2.) But adjudication will form an impediment to accretion, since thereby the right of the heir is excluded; and a title in his person, completed after the adjudication is duly feudalised, will be burdened with the adjudger's debt, since the constructive title produced by a charge against the heir to enter, which is disobeyed, can operate only for behoof of the adjudger, as infeftment of the heir does not take place. (See *Adjudication contra hæreditatem jacentem.*)

(*a*) Alison, 28th Feb. 1708, M. 7773; Paterson, 10th Dec. 1742, M. 7775; Henderson, 5th July 1821, F. C.

173. CASES OF DEFECTIVE OR INTRICATE TITLES.—The instances which have been given in the preceding sections are of frequent occurrence, and readily present themselves to those acquainted in some degree with the theory of conveyancing. They are more fitted, therefore, for the student than the practitioner. In order the more fully to perceive the effect of confirmation and of resignation *in favorem* and *ad remanentiam*, it is necessary to assume situations in which the state of the title has become deranged, and requires a remedy, before or after granting a disposition.

1. *Resignation on the wrong procuratory.*—Put the case that a disponee has acquired his right from one infeft, but unentered, and that in place of also taking infeftment on his author's disposition, and obtaining confirmation of both dispositions and sasines, or confirming his author's infeftment, and resigning on the second procuratory, (§ 166,) he has, by mistake, obtained and been infefted on a charter of resignation, in virtue, not of the procuratory in the disposition in his own favour, but of that in the disposition on which his author had already been infefted, as having right to it by assignation. By this means, the base fee constituted by his author's infeftment is left behind, the disponee being his author's superior in that fee. In order to extricate the title, the disponee will take infeftment on the indefinite precept in the disposition in his own favour, whereby he will hold base of his author, who will thus be in right of a mid-fee between the two fees held by the disponee.

By confirming the infeftment thus taken in his own favour, the disponee will evacuate the mid-fee; and as he will thus hold base of himself, he may consolidate the two fees by resignation *ad remanentiam*.

2. *Erroneous combination of the charters of confirmation and resignation.*—(1.) In the situation assumed in Art. 1, let it be supposed that the disponee, having already taken infeftment on the disposition by his author, is desirous of completing his title, and that he obtains a charter of confirmation and resignation, confirming both infeftments, and proceeding upon the procuratory in the second disposition, on which charter infeftment has been completed. The question arises, which of the two rights is the preferable;—that by resignation, or the other by confirmation? In an election case (*a*) it was decided that they did not mutually destroy one another, since the words of the obligation to infeft authorise entry by resignation or confirmation, *or both, the one without prejudice of the other*, and that the preference was to be given to the resignation as first in order, the ceremony of resignation preceding the authentication of the charter, and forming an obligation on the superior to do nothing in prejudice of that right. The confirmation was thus held to be inept, or at best a confirmation of a subaltern holding, which, in modern practice, is obsolete; and there was authority for the view thus taken by the Court in a prior case of the same nature (*b*). In neither instance was there a competition of real rights. The effect of these decisions seems only to have been, that a party claiming a right to vote on a superiority might, in the absence of any competing title, ascribe his right to the resignation; and it may perhaps be assumed, without any impeachment of the grounds of decision, that had the party founded on the confirmation, the title, as a mere title to claim enrolment as a freeholder, would have been in like manner sustained. This, indeed, seems to have been admitted in the argument. (2.) But if it be assumed that the rights are in different persons, the rules of determination will necessarily vary. Thus, let it be supposed that A. grants a disposition to B. and a disposition to C., each containing an alternative obligation to infeft, and a procuratory of resignation; that B. takes in-

feftment on the indefinite precept in the conveyance in his favour, and C. on the other hand proceeds by resignation; and that a charter of confirmation in favour of B. is obtained *prior* to the completion of C.'s infeftment on a charter of resignation, but *after* the act of resignation has taken place in the hands of the superior. There seems to be no authority for holding that, in such circumstances, the title by resignation would exclude that by confirmation. (3.) It may perhaps be doubted, if, on feudal principles, a title in the form made up in the case of Stewart ought, even where there is no competitor, to be ascribed to the resignation in preference to the confirmation (*c*); and it is assumed in practice, that in the union of the charters of resignation and confirmation, the preference is given to the confirmation, for it is held to validate the procuratory on which the resignation is made. But it seems to be supposed, that to ascribe the title to either resignation or confirmation, in the option of the party, is not inconsistent with feudal principle, while it accords with the terms of the obligation to infeft. It is plain, however, that resignation in the situation of the title assumed at the commencement of this article is at least superfluous. If the resignation were held to supersede the confirmation, then it is manifest that a base fee remains, which must be extinguished by resignation *ad remanentiam;* and this is perhaps the safe course to follow.

3. *Intricate case of splitting.*—Put the case that, for a particular object, B., the disponee, has obtained a charter of resignation on the procuratory in the disposition granted by A., the seller, and, without taking infeftment on the charter, has executed the precept in the disposition; that, in the next place, he grants a subaltern feu or blench right to C.; and finally, that he completes an infeftment on the charter of resignation. B. then re-acquires the property by purchase from C., and is desirous of re-uniting it with the superiority vested in himself in virtue of the charter and sasine. According to the doctrine explained at § 164. 3, infeftment on the charter of resignation did not evacuate the base right which was constituted by B.'s infeftment on the disposition; that base right forms a mid-fee between the superiority and the subaltern grant in the person of C. There are thus three fees in

existence—one of superiority in the person of B., the second of mid-superiority in his person, and the third a subaltern fee in the person of C. But as the mid-superiority, from its nature, cannot be evacuated by B.'s own confirmation, and the subaltern right, as proceeding on a grant *de me*, is incapable of being made public by confirmation, the title will be best extricated by a double process of consolidation, viz. by B. resigning the mid-fee in his own hands as superior, and then resigning in his own hands on the procuratory of C., the vassal in the feu or blench right, both *ad remanentiam*.

4. *Defective obligation to infeft.*—Cases of difficulty may arise from errors in framing the obligation to infeft. (1.) If, in place of being alternative, it contain a base-holding only, and that, on a disposition of this description, A., the seller, has been infeft, B., the purchaser, may with safety accept of a conveyance from A., containing an alternative obligation to infeft, and an assignation to the procuratory of resignation in the disposition in favour of A.; for, by taking immediate infeftment, his title to the property will be secure, and, by executing the procuratory, he may acquire a title to the superiority. The mid-fee thus left in the person of A. will, as above, (Art. 1,) be evacuated by B.'s own confirmation of his infeftment on A.'s disposition, which, as proceeding on an indefinite precept, is capable of being made public by confirmation; and consolidation will be effected by resignation *ad remanentiam*. (2.) Where, on the other hand, the obligation to infeft in the disposition in favour of A., the seller, is *a me* only, and thus imports a public holding, it is plain that the purchaser would not be safe in accepting a disposition from A. until his own title had been validated by confirmation; (§ 149. 4, 6.)

5. *Effect of superior's refusal to confirm.*—It is a question of much importance in modern conveyancing if the superior may refuse to enter a disponee by confirmation. (1.) In the ordinary case, the superior can have no interest to prevent disponees from completing their titles as they deem most expedient; but cases may occur with reference to the restraining clauses now generally introduced in feu-rights of building ground, where the superior's right to enforce these clauses by

[redacted]

purchasers have no ground of complaint, since the *terms of the original grant* point out to them those restrictions *for which the superior* has stipulated. (3.) The superior's *refusal of confirmation* would thus render necessary an entry by *resignation*, and the consolidation of the two fees by *resignation ad remanentiam*, as in § 170.

6. *Effect of seller's heir entering after an absolute conveyance.* A., whose title is complete, sells to B., and on his disposition B. is infeft indefinitely, but his infeftment remains unconfirmed by the superior, so that he holds base of

A. the seller. Upon A.'s death, C., his heir, obtains from the superior a precept of *clare constat*, which, through inadvertence, contains among other subjects the lands sold to B. It has been questioned if, in these circumstances, the superior can accept resignation on the procuratory of A.'s disposition, or even grant confirmation of the infeftment on it, having already given an entry to C. in the same subjects; but as C. is the same person in law as his ancestor, and liable in the warrandice of A.'s conveyance to B., it is held that there is virtually no change produced by his entry with the superior, who can still validly recognise and act upon the feudal clauses of that conveyance, by accepting resignation, or granting confirmation so as to evacuate the mid-superiority in the person of C. (*d*). In the circumstances supposed, the superior was not bound to recognise the heir of A., the seller; (§ 148, Art. 4.) (*e*); and the question could only have occurred through error.

(*a*) Stewart, 20th Feb. 1827, F. C., (p. 368,) 5 S. 383.
(*b*) Campbell, 4th Jan. 1754, 5 B. S. 809.
(*c*) See Drummond, 17th May 1793, M. 6936.
(*d*) Fullerton, 22d Nov. 1833, F. C., 12 S. 117.
(*e*) Mackenzie, 11th July 1838, (Scottish Jurist,) reported since the former sheet passed through the press.

TITLE XIV. ENTRY WITH THE CROWN.

174. SIGNATURES. — The principles which regulate the entry of a purchaser in lands holding of the Sovereign as paramount superior, in no respect differ from those which prevail where the superior is a subject. But the forms of the deeds differ materially, and the complexity in the procedure operates to the serious detriment of Crown vassals. The contemplated improvements in our system of land rights cannot begin with more propriety or advantage than in lopping off the redundancy which exists in this department. These forms commence with a writ, called a *signature*, which, as being the warrant of the subsequent writs, it is necessary shortly to describe. Signatures are framed and authenticated by a clerk to the Signet, and contain the clauses which, after a course of examination and translation of little real utility,

ultimately settle down into the form of the Crown charter. When approved of by the Judge officiating in the Court of Exchequer, as Commissioner of the Sovereign, (and of the Prince of Scotland when the Sovereign has a son,) the signature becomes the warrant for engrossing and passing the writ on which the charter immediately proceeds. The signature of resignation will serve as the type of this class of writs.

175. SIGNATURE OF RESIGNATION.—PREAMBLE.—The introductory clause or preamble of the signature is expressed as in the notes (*a*). The duties performed until recently by the Barons of the Court of Exchequer are now discharged by one of the Judges of the Court of Session, specially appointed for that purpose by statute.

(*a*) Jurid. Styles, 1. 477. Our Sovereign Lady with the special advice and consent of the Honourable A. G. the Judge of the Court of Exchequer acting as revising Judge in Exchequer in virtue of the statutes made thereanent ORDAINS a charter to be made and passed under the Seal appointed by the Treaty of Union to be kept and used in Scotland in place of the Great Seal thereof formerly used there.

176. DISPOSITIVE CLAUSE OF SIGNATURE.—This clause is necessarily a mere transcript of the dispositive clause of the deed on which the charter proceeds, and when in conformity with the last Crown charter or special retour, there is no difficulty in having it passed by the revising Judge. When the conveyance is of part only of certain lands described in a former charter by a baronial or other comprehensive name, the signature will still follow the style of the disposition, in which they will be expressed as part and portion of a particular barony or estate; and for instructing the dispositive clause of the signature, the disposition, as well as the last charter or retour, will be exhibited.

177. QUÆQUIDEM OF SIGNATURE (*a*).—The signature of resignation differs from that of confirmation, in having a clause of *quæquidem*, which contains a deduction of the title since the last Crown entry. This clause is common to the signatures of resignation of adjudication and of sale, and those passing on gifts of forfeiture, *ultimus hæres*, and bastardy. Signatures

of forfeiture, *ultimus hæres* and bastardy pass upon letters of presentation by the Crown, whereby the right which devolved to the Crown is transmitted to or conferred on the presentee or donator. His entry will be completed, therefore, according to the state of the title as it stood in the person whose right devolved to the Crown, whether the lands hold of the Crown or a subject, the presentation being precisely equivalent to adjudication as regards the title (*b*).

(*a*) Jurid. Styles, 1. 478. See above, p. 232.
(*b*) Jurid. Styles, 1. 568.

178. INCIDENTAL CLAUSES OF SIGNATURE.—After the *quæquidem* are introduced those clauses which are adapted to particular circumstances.

1. *Change of name of lands.*—Where it is desirable to give a new name to the lands, this will be done in an express clause (*a*), declaring that they shall be designated by the name thus given to them in all time coming.

2. *Clause of novodamus* (*b*).—A new grant of the lands, called a *novodamus*, may be rendered necessary or expedient by the loss or destruction of the title-deeds. A clause of this nature imports a discharge of bygone casualties of superiority, and of the consequences of feudal delinquencies; and although containing other subjects besides those in which the vassal or his authors were formerly invested, it is a valid grant, in so far as concerns the superior, of all the subjects expressed in it (*c*). It is therefore with difficulty that such clauses in signatures are entertained. The signature must be preceded by a petition to the Lords of the Treasury, on which the Judge in Exchequer makes his report; and if the application be conceded, the signature will be superscribed by her Majesty (*d*). Such clauses are passed without difficulty by subject-superiors in renewing investitures, where the feu-duties have been regularly paid and accepted.

3. *Erection of a barony* (*e*).—A clause of this description must proceed in like manner on the report of the Judge in Exchequer on a petition from the applicant. It can now serve the purpose merely of a clause of union, unless it be to confer a baronial or comprehensive designation on the lands,

and a jurisdiction of a very limited nature (*f*). The once valuable privileges of barons were taken away by the Jurisdiction Act (*g*). Clauses of this description may be regarded as almost obsolete in practice.

4. *Disjunction from a barony* (*h*). A clause of disjunction may be obtained without a petition, on the authority of the Judge Reviser. It is applicable to the conveyance of certain parts and portions of a barony, in order to take these out of the jurisdiction. It is almost obsolete.

(*a*) Jurid. Styles, 1. 469.
(*b*) Jurid. Styles, 1. 470, and 497.
(*c*) Ersk. 2. 3. 23; Riddel, 27th June 1758, M. 9346; Grant, 10th August 1775, 5 B. S. 527.
(*d*) Jurid. Styles, 1. 470.
(*e*) Jurid. Styles, 1. 470 and 499.
(*f*) 20 Geo. II. c. 43; Ersk. 1. 4. 28.
(*g*) 20 Geo. II. c. 43.
(*h*) Jurid. Styles, 1. 471 and 498.

179. CLAUSE OF UNION (*a*).—The use of this clause is explained at § 76. 2.

(*a*) Jurid. Styles, 1. 471 and 478; above, p. 116.

180. TENENDAS.—The clause of *tenendas*, which expresses the holding, is translated from the last charter. This clause of the charter being peculiar, as still containing an anxious enumeration of accessory rights, is exemplified below (*a*).

(*a*) " TENENDAS ET HABENDAS TOTAS ET INTEGRAS TERRAS DECIMAS aliaq. " cum pertinen. supra script. per dict. A. ejusque prædict. de nobis nostrisque " regiis successoribus immediatis legitimis superioribus earund. in libera alba " firma (or feudifirma) feodo et hæreditate pro perpetuo per omnes rectas metas " et limites suas antiquas et divisas prout jacent in longitudine et latitudine in " domibus, ædificiis, hortis, pomariis, bustis, *(boscis,)* planis, moris, mersciis, " viis, semitis, aquis, stagnis, rivolis, pratis, pascuis et pasturis, molendinis, mul- " turis, et eorum sequelis, aucupationibus, venationibus, piscationibus, petariis, " turbariis, carbonibus, carbonariis, cuniculis, cunicularis, columbis, colum- " bariis, fabrilibus, brasinis, brueriis, genistis, *silvis, nemoribus, virgultis,* lignis, " tignis, lapicidiis, lapide et calce, cum curiis et earum exitibus, hærezeldis " bloodwittis et amerciamentis, cum communi pastura, liberoque introitu et " exitu, ac cum omnibus et singulis aliis libertatibus commoditatibus proficuis " *immunitatibus* asiamentis et justis suis pertinen. quibuscunque tam non nomi- " natis quam nominatis, tam subtus terra, quam supra terram, procul et prope, ad

" prædict. terras aliaque prescript. cum pertinen. spectan. seu juste spectare " valen. quomodolibet in futurum libere quiete plenarie integre honorifice bene " et in pace sine ulla revocatione contradictione obstaculo seu impedimento " aliquali." The above quotation shews the terms of the clause as contained in Dallas, (p. 43,) with the additional terms contained in the modern form of the charter. These are marked in italics. The old and existing forms of the clause are thus essentially the same, except in one term, which is *boscis* in the modern, and *bustis* (meaning *tombs, graves or sepulchres)* in Dallas's form. Craig (2. 3. 31.) informs us that in Crown charters were added the words, *sok, sak, infangthief, outfangthief, cum mulierum merchetis*, which he explains thus: " Quod ad *sokkam* " attinet puto servitium omne rusticum comprehendere, quemadmodum de *sokka* " sive *vomere* antea diximus, in interpretatione vocis *Soccomanni*. SAK recte ser- " vitium judiciale exponit doctissimus Dominus Skenæus; itaque in ejus vocis in- " terpretatione longius non immoror. Quod ad *Merchetas mulierum* attinet, puto " hoc falso nostrorum hominum moribus tantum adscribi, quasi apud nos solum " domini pudicitiam virginum soliti essent delibare, quæ in eorum territorio " locarentur: satis enim constat, et eundem morem in Gallia fuisse, et ab iis ad " nos cum feudis transiisse; potius, inquam, credendum, quam a nobis ad eos."

The *tenendas* may be translated as follows: " TO BE HOLDEN AND TO HOLD " ALL and WHOLE THE LANDS TEINDS and others with the pertinents above " written by the said A. and his foresaids of us and our royal successors im- " mediate lawful superiors of the same in free blench-farm (or feu-farm) fee " and heritage for ever by all the righteous meithes and marches of the same " old and divided (in Dallas *divised)* as the same lie in length and breadth in " houses biggings yards orchards woods (in Dallas, as above, *tombs, graves or* " *sepulchres,*) meadows moors marshes ways passages waters pools streams fields " grazings pasturages mills multures and sequels hawking hunting fishings " peats turfs coals coal-heughs rabbits rabbit-warrens" (in Dallas, *cunnings cunningaries)* doves dovecots smiddies forges (in Dallas, *smiths smiddies)* brew- eries brush-wood woods groves coppices buried timber (Ross, 2. 176,) quarries of stone and lime with courts plaints herezelds bloodwits and amerciaments (Dallas, 572, Ross, 2. 175,) with common pasturage free ish and entry and all and sundry liberties, &c. &c.

181. REDDENDO.—The clause of payment or return is likewise taken from the last charter. Where the lands form part and portion of other lands, the cumulo *reddendo* may be split and apportioned, by application to the Judge in Exche- quer, in the form of petition. Unless a splitting be made, the signature, and consequently the charter, must contain the cumulo duty.

182. FORMS IN EXPEDING THE CHARTER (*a*).—1. *Signa- ture.*—A disponee desiring entry with the Crown, delivers at the office of the Presenter of Signatures in Exchequer, with- in six days after the commencement of a term of Court, a

note for enrolling his signature. In the course of a few days, the writer to the signet employed by him to expede or carry the charter through the seals lays the title-deeds before the presenter, with an inventory and deduction of the disponee's title, called a *brieve for revising*. This is accompanied with a *note for resigning*, (if the signature be one of resignation,) which is a short memorandum of the names of the parties and of the lands, and, at the same time, the *signature* is laid before that officer and compared by him with the warrant and titles. It is authenticated by being indorsed with the subscription of a writer to the signet. On a day fixed, the Judge Reviser, (whose duties are ministerial) (*b*), attended by the presenter and a writer to the signet, *revises* the signature, or compares the dispositive clause, and the *tenendas* and *reddendo*, with those clauses as contained in the last charter or retour, and authenticates the writ as duly revised. The date of revising is inserted as the date of the signature. Afterwards, the *composition* payable to the Crown by a singular successor (a sixth of the valued rent) is struck and paid; and on another day fixed, the ceremony of resignation proceeds in presence of the Judge in Exchequer, by a macer of Court reading and delivering to his Lordship the several notes for resigning. The signature is then registered in the books of Exchequer by the Queen's Remembrancer, a copy being left for this purpose authenticated in like form as the principal writ, and it afterwards receives the prefix of the cachet or *fac simile* of the Sovereign's sign-manual, which is stamped by the keeper on a blank space left at the top of the first page.

2. *Precept* (*c*).—The signature thus revised, registered and authenticated, becomes the warrant for a writ in the Latin language, called a *precept*, addressed to the Director of Chancery, whereby he is required to prepare and issue the charter of the lands the ultimate object of these complicated forms, and for which the precept is the only legal and sufficient warrant (*d*). The precept, in the first instance, passes the Signet, the signature being left as its warrant; and it is then taken to the office of the Keeper of the Privy Seal, where certain fees are paid to the writer to that Seal. It is a perfect writ, and is carried to the office of the Director Chancery.

3. *Charter* (*e*).—The perfect deed or charter proceeds in name of the Sovereign. It is nearly a transcript of the precept, with the exception of the formal parts and that it contains a precept of sasine for infefting the disponee. It is authenticated by the subscription of the Director of Chancery and the Keeper of the Great Seal, and bears the date of the signature. The date of registration and of passing the Great Seal is likewise added (*e*); and as it is the sealing that gives authenticity to the charter, the date of sealing may be of importance in a question of priority. (See § 149, Art. 6.) But the impression of the seal on wax is not in practice appended to the deed, unless when it is to be produced in a foreign court, (which every court in England is with relation to Scotland,) or in either House of Parliament. The forms in passing a charter of confirmation differ only in the omission of the ceremony of resigning.

(*a*) Jurid. Styles, 1. 472, *et seq.*
(*b*) Viscount Teviot, 12th Feb. 1697, M. 5109.
(*c*) Jurid. Styles, 1. 510.
(*d*) 49 Geo. III. c. 42, § 13.
(*e*) Jurid. Styles, 1. 522.

183. MODE OF ENTRY IN THE PRINCIPALITY LANDS.—The only, or the eldest son of the reigning Sovereign, possesses, as Prince and Steward of Scotland, the right of superiority of certain lands. When a prince exists, the entries in these are given in the same form as is in use in entries with the Crown, the Signet, the Seal and the Register of the charter being distinct. When there is no Prince in existence, the charter is granted by the Sovereign, as Queen, Princess and Stewardess of Scotland, and passes the Seals as a Crown writ (*a*).

(*a*) Jurid. Styles, 1. 475 and 305.

184. ENTRY TO CHURCH LANDS.—Signatures of vassals in kirk-lands, that is, lands which belonged to the prelates or bishops, and their chapters, and now hold of the Crown, are passed *per saltum*, as it is called, where the lands are valued at less than L.100 Scots (*a*). In other words, the signature, when revised and registered, becomes the immediate warrant

of the charter, and the disponee pays no composition for his entry. The precept is thus excluded from the series of forms. By the first of the statutes referred to, the fees payable by kirk-vassals in Exchequer, and at the offices of the Signet and Seals, in lands whose valuation does not exceed L.200 Scots, are considerably reduced; and by the latter, the heirs of those holding kirk-lands valued at L.100 Scots or under, are exempted from paying a fee, called *sasine ox*, to the Sheriff, and have other privileges in the reduction of official dues.

(*a*) Jurid. Styles, 1. 475.

185. SUGGESTIONS IN REGARD TO CROWN ENTRIES.—The privileges conferred by the statutes referred to in § 184, may, it is humbly thought, without much detriment to the revenue, be accorded to all Crown vassals, and the mode of entry *per saltum*, (omitting also the writ called a signature,) advantageously introduced. It is plain, from the nature of the forms which have been shortly noticed under the present title, that the charter is the only essential writ. There can therefore be no objection in principle to producing the charter in draught to the Judge Reviser, and after it has been revised, carrying it to the Director of Chancery to be ingrossed and completed. It ought to be framed in English. The seal, likewise, is an incumbrance handed down to us by our feudal progenitors, which cannot too soon be got rid of in all circumstances. One of the two registers, in respect of which dues are at present charged, ought also to be abolished, and all distinctions removed between Crown charters, and charters by subject-superiors. Under the present system the risk of error is considerable, and the expense very great. The terms of the signature must be faithfully transcribed into the precept, and again into the charter; and objections not affecting the formality of this last writ have been taken, which, although not entertained in the circumstances in which they were stated, might, in a competition of real rights, have been attended with difficulty (*a*).

(*a*) Burn, 17th Feb. 1779, M. 8852.

CHAPTER IV.

REDEEMABLE CONVEYANCES OR RIGHTS.

TITLE I. THE WADSET.

186. SECURITIES OVER LAND.—Land and its pertinents give, from their nature, the most perfect security that can be devised for the loan of money, and have from the earliest periods of our history formed a source of credit to the owners. We learn from Lord Kames (*a*) that the first form of security over land employed by our ancestors was the *rent-charge*, of which examples are preserved by him. This deed is said to have been analogous to a form common in England (*b*). It consisted in an acknowledgment for the money, and a transference of the power of the proprietor to *distress* the tenants, or as it is styled in Scotland, to *poind the ground*. The rent-charge appears to have been identical with or analogous to the *ground-annual* (*c*), which, after the lapse of centuries, is again creeping into practice. (See § 137.) The rent-charge gave place to the feudal securities of the *annualrent right* and the *wadset*, and these have in their turn been abandoned for the more perfect forms of the *heritable bond*, and *bond and disposition in security*. Redeemable conveyances, whether voluntary or judicial, are generally termed *redeemable rights*, or *rights in security*.

(*a*) Law Tracts, p. 162, and App.
(*b*) Ross, 2. 324-5.
(*c*) Ross, 2. 325.

187. ORIGIN OF THE WADSET.—This form of security being unknown in the ordinary practice of conveyancers, is chiefly interesting as a precursor of our modern forms. The check given to sub-infeudation by several statutes, (see § 91-2,) although it had no permanent effect, made subaltern rights for a time insecure, as in certain circumstances inferring forfei-

ture (by recognition) of the fee. It is natural, therefore, to suppose that proprietors desirous to dispose of their lands, and having neither the power to grant subaltern rights with safety, nor to transmit the fee without the consent of the superior, would invent methods for eluding the laws whereby the free commerce in land was restrained. The conjecture may therefore perhaps be hazarded, that the wadset, in its original shape, was a mode employed for protecting purchasers against recognition, the right of reversion incorporated in the charter enabling the parties to defend the transaction from the character of an alienation, since it empowered the reverser or apparent debtor (although probably a real seller) to redeem the lands, and thus gave it the ostensible form of an impignoration. The frequency of such transactions, viewed in connection with the great scarcity of money in those early times, adds perhaps to the probability of the notion, that the wadset was originally a covert sale, and came only by degrees to be employed as a security for money (*a*).

(*a*) See 1469, c. 27.

188. FORM.—Wadsets were originally in the form of a charter of the lands granted by the debtor or *reverser* to the creditor or *wadsetter*, with a holding either public or subaltern; and the right of reversion was embodied in the deed, as a qualification of the conveyance. But the form changed to that of a simple deed of alienation, the debtor receiving in exchange for the conveyance a *letter of reversion*, which was declared by statute (*a*) to be effectual against singular successors. This act prescribed a mode of registering reversions, but for preservation only, and not as essential to the validity of the right, a proviso with regard to reversions in a separate form which was afterwards introduced by the Registration Act of 1617 (*b*). Finally, about the year 1661, the wadset took the form of a mutual contract, and was executed in duplicate for the convenience of the parties (*c*).

(*a*) 1469, c. 27.
(*b*) 1617, c. 16; above, p. 121.
(*c*) Dallas, p. 709, *et seq.*; Jurid. Styles, 1. 274, *et seq.*

189. RIGHTS OF REVERSION.—The legal effect of the right of reversion was entirely consistent with the notion that a wadset was a covert sale, but can hardly be explained on any other supposition. Reversions were *strictissimi juris*; and although this rule was in many instances relaxed (*a*), its rigour was at one period extreme. Balfour (*b*) states, upon the authority of a decision, that in following the order of redemption, it behoved the reverser to consign the money in the precise metals specified in the letter of reversion. Thus, where a certain sum was specified, of which a *penny* or *half-penny* formed a part, the consignation was not lawful if made wholly in gold or silver, and it required a special statute to validate the tender of the money in any other medium than the express coins stipulated by the wadsetter (*c*). Nor were reversions transmissible to assignees unless so conceived, until after the using of an order of redemption (*d*). The right of reversion has been transferred in substance to our modern forms, and appears in the precept of sasine of the heritable bond and disposition in security.

(*a*) Ersk. 2. 8. 5.

(*b*) Balfour, *v. Reversions*, c. 11, edit. 1754, p. 455.

(*c*) Ross, 2. 337, *et seq.* 1555, c. 37. *Item* Because there is diverse and sindrie reversions maid and given for redemption and out-quitting of lands beirand and conteinand gold and silver of certaine special valour and price And the said gold and silver is not now to be gotten quhairthrow the havers of sik reversiones hes bene ofttimes differed fra redemption of their lands Therefore it is DEVISED STATUTE and ORDAINED anent all reversiones beirand and conteinand gold and silver or uther of them of certain special valour and price or cuinzie that gif sik gold and silver cannot be had nor gotten within the realme the havers of thay reversiones may redeeme the landes specified therein be vertew of their saidis reversions givand golde and silver havand course for the time beand of the samin valour weight and fines as the gold and silver specified in the saidis reversiones conform to the commoun law: And this act to be extended to all and quhatsumever reversiones bygane and to come.

(*d*) Erskine, 2. 8. 7, 8.

190. REGISTRATION OF REVERSIONS.—By the Registration Act (*a*), reversions were placed on the same footing with sasines in the matter of registration; but those are excepted which are contained in the body of the wadset. An *eik to a reversion*, which means an addition made to the burden by means of a separate deed, on the advance of a farther sum by the wad-

setter, followed the rules applicable to the principal writ (*b*). Bonds and obligations for making reversions, which took their rise out of the strict rule of interpreting letters of reversion, and were equally valid as a completed letter (*c*), are likewise enumerated in the statute. Erskine is of opinion that the preference of registered reversions, although not mentioned in the act of 1693, in like manner as of real rights by infeftments, is regulated, not by their dates, but according to the dates of their several registrations (*d*). Leases in favour of the wadsetter, to endure after the redemption, were often forced from the reverser by his difficulties, and were therefore discouraged by the statute which protects *bona fide* tacks or leases against singular successors (*e*); but leases for a rent exceeding a half of the real value of the subjects were sustained, if duly registered (*f*).

(*a*) 1617, c. 16; see above, p. 121.
(*b*) Ersk. 2. 8. 10; but see More's Notes on Stair, clxxvi, and cases cited.
(*c*) See Ross, 2. 338.
(*d*) Ersk. 2. 8. 12.
(*e*) 1449, c. 19.
(*f*) Ersk. 2. 8. 13.

191. POWERS OF THE REVERSER.—The power to redeem could, in the ordinary shape of the wadset right, be limited only by an express irritancy, to take effect upon the reverser failing to pay the debt on a day certain (*a*). The right was carried by assignation when in a separate form; but when incorporated in the body of the wadset, it could be conveyed by disposition and sasine only. The reverser might redeem, or, in other words, extinguish the wadset right by using particular judicial forms (*b*). On the other hand, when the right of reversion was limited, the wadsetter might, after the term of redemption, demand his money by requisition; but, as this step made the right moveable, it was seldom employed (*c*).

(*a*) Pollock, 10th Nov. 1738, M. 7216; Kerscallan, 21st July 1749, M. 7219.
(*b*) Ersk. 2. 8. 20, and foll.
(*c*) Ersk. 2. 2. 16.

192. PROPER WADSETS.—Wadsets are either *proper* or *improper* (*a*). The *wadset proper* was not simply a pledge, but

a right of property redeemable by the reverser. In this kind it was covenanted, that the lands should, during the not redemption, be enjoyed by the wadsetter for the use of his money; so that as he undertook the risk of deficiencies, he enjoyed the yearly fruits without any obligation to account. The proper wadset appears to have been a form employed in sales, when the superior refused to receive the purchaser.

(*a*) Ersk. 2. 8. 26-29.

193. IMPROPER WADSETS.—The *wadset improper* is, on the other hand, defined by Mr Erskine (*a*), to be "nothing more "than a *pignus* or right of security, in which the wadsetter "is accountable to the reverser for the neat yearly sums "which he hath or might have received out of the wadset "lands;" and he describes the ruling difference between the two rights to be, that in the improper wadset, "the wadsetter "acts merely in the reverser's name, and must account to "him for what he receives, as if he was his steward or fac-"tor; whereas in a proper wadset, the wadsetter acts *tanquam* "*interim dominus*, (as a temporary proprietor); what he re-"ceives of the rents is his own, with this only deduction, that "every year's rent received by him, be it high or low, extin-"guishes a year's interest of the debt due to him by the re-"verser." The improper wadset, which is thus a mere security for money and its annual interest, is a right of comparatively modern introduction. It came into use soon after the Reformation. From the nature of the right, it follows that wadsets redeemable on payment not only of principal, but of interest also, are improper. Proper wadsets became improper by the wadsetter granting a back-tack of the lands to the reverser, who was then liable only in payment of legal interest. These tacks were frequent, and to be effectual against singular successors behoved to be recorded in the Register of Reversions. Reversers were, by express statute, empowered to render proper wadsets improper, by giving security for payment of the interest. As the wadset has become almost obsolete in practice, it is unnecessary to enter more minutely into the subject.

(*a*) Ersk. 2. 8. 26.

TITLE II. ANNUALRENT RIGHT.

194. HOW DISTINGUISHED FROM THE WADSET.—The annualrent right differed from the wadset in this material feature, that it was a grant, under redemption, of a yearly payment out of lands, in place of the lands themselves. It was thus from the beginning a mere cover for the taking of interest, which was directly prohibited by the Canon law; and as its history is intimately connected with that of the personal bond or obligation now incorporated in our heritable securities, some account of the origin of these two rights may not be out of place here.

195. DEVICES FOR TAKING INTEREST.—The Canon law, or law of the Church, which at an early period materially controlled the civil law, or law of the State, prohibited the lending of money for an annual payment, as contrary to natural justice. Whether the prohibition arose from a disinterested motive on the part of the churchmen, or a desire to monopolise the profits of money, it is unnecessary to inquire. The Canon law having in that age, from the extensive authority of the Church, obtained universal respect in Christendom, the taking of interest was declared illegal by the common law both of England and Scotland. But it is remarkable that the prohibition was confined to the loan of money upon personal security, whilst transactions of a lucrative description were permitted upon the security of land property. This state of the law threw the dealing in money upon mere personal security in a great measure into the hands of the Jews, whose law does not prohibit them from taking interest from strangers, and their exactions becoming exorbitant, the evil in course of time suggested its own cure. Devices of various kinds were invented for eluding the law; and after the discovery of the *Corpus Juris Civilis* in the twelfth century, these were successfully practised under the refinements of that celebrated code. It is alleged that certain Lombard and other Italian merchants were the first who attempted, in this island, to contend under colour of the Roman law with the Jewish money-lenders, who justified their usury, at least to their own consciences, by the law

of Moses. These merchants are supposed to have carried with them the forms of deeds prepared in accordance with the Imperial laws, by which the direct stipulation of interest was evaded in this manner. The civil law admits a distinction between express usury and *damages and interest:* it allows a lender to stipulate remuneration for the loss which he sustains through delay in repayment of the sum advanced, although it condemns a return for the bare use of money. By the help of this legal fiction, the Christian money-lenders were enabled to enter the market. Other equally fictitious modes of evasion were invented. The civil law permitting damages and interest to be taken, in certain cases, to double the amount of the sum advanced, the ingenuity of the lenders thence invented the English double bond, which has preserved in a great measure its original form, notwithstanding the change in the law. The taking of interest in England was legalised in the reign of Henry VIII.; but the creditor still stipulated for double payment, the restriction to the lawful interest on the loan being the operation of the law (*a*).

(*a*) Ross, 1. 1. *et seq.*

196. RATE OF INTEREST FIXED.—In Scotland the introduction of the civil code produced similar modes of evading the prohibition of the Canon law; and we learn from Balfour (*a*), that bonds, or, as they were then styled, *obligations*, were taken for double the sum advanced by the lender. Much evil arose from this state of things. Under the sanction of the civil law, usurers were enabled to exact exorbitant returns from borrowers who had only personal security to offer. Those who were possessed of land property obtained loans of money at a more reasonable rate, by wadsetting their lands, or giving rights of annualrent over them secured by infeftment, which, as the lender had no power to call up his money, were not regarded as usurious. These annualrent rights were the more readily adopted, that securities over land obeyed a different rule in this country from that in force in England, and became feudal, to the no small aggrandisement of those who intrusted their money in that form of investment. Mr Erskine informs us, "that the "annualrenter infeft is not only said to have died in the fee,

"but which is more material, he enjoys the privileges of a "baron (*b*)." The extortions of the money-lenders from those who were obliged to borrow on personal security, were however checked by degrees. The penalty introduced in obligations to cover loss and damage became subject to restriction by the Court; and at length our Legislature, following the example of England, fixed the rate of interest at "L.10, or five "bolls of victual for every L.100 by year (*c*)." It would be erroneous, however, to assume that our Scottish statute was passed to authorise the taking of interest: the use of that term, which had been introduced from the civil law, proves that the purpose of the Legislature was not to legalise, but to restrict (*d*), and the act contains an exception of all lawful bonds, contracts, obligations, infeftments or other securities made antecedently upon annualrents of money or victual. Usury thus became the taking not simply of a direct return for the use of money, but of greater interest than the law permitted.

(*a*) Balf. *v. Obligation*, c. 4, edit. 1754, p. 150.
(*b*) Erak. 2. 8. 31.
(*c*) 1587, c. 52.
(*d*) Erak. 3. 3. 76; Ross, 1. 35.

197. CHANGES ON THE ANNUALRENT RIGHT.—Under the altered state of the law with respect to interest, the annualrent right, by undergoing certain improvements and alterations, and borrowing from the wadset infeftment in the lands themselves in place of in a yearly burden on their fruits, was transformed, on the one hand, into the modern moveable or personal bond, and on the other into the heritable bond. It would appear from a method of relieving debtors in rights of annualrent practised during the reigns of the last Stuarts, by allowing retention out of annualrents of one or a half *per cent.*, when extraordinary supplies were directly imposed on the landed interest, in order to throw a share of the burden upon the capitalists, that the lending of money upon the security of land had at that period been carried to a great extent. But as such security must necessarily have a limit, a mode was devised, when money became more abundant, of investing it on personal security, without abandoning

the feudal prejudice in favour of the annualrent right by infeftment (*a*). In the interval between the periods when President Balfour and Sir Thomas Hope wrote, the annualrent right had assumed the form which the advancement of the country in population and improvement, and the consequent necessity for a free commerce in money, would naturally produce (*b*). It had taken such a shape as to admit of the creditor calling up the principal sum on a requisition of forty days, and a term of payment and clause of execution were frequently inserted, which superseded the clause of requisition (*c*). In this situation, those lenders who were unable to procure heritable security, but desired that their investment should partake of the nature of heritage, introduced in their bonds an obligation to pay annualrent, *as well infeft as not infeft*; and we learn (*d*), that the Court having dispensed with the substance, refused to exact adherence to the mere form, and at length adjudged a bond to be heritable if it simply contained *an obligement to pay annualrent*. In this way, the extraordinary anomaly prevailed of the mere payment of annualrent, and not the nature of the security, being the test of the quality of the right. The old annualrent right improved in form in one respect by the wadset, and in another by the Roman obligation, was thus the parent both of the modern heritable and moveable bonds,—the latter acquiring its present simple form after the Legislature had removed the anomaly which has been noticed, by declaring personal bonds to be moveable as to succession (*e*).

(*a*) Ross, l. 44.
(*b*) Hope's M. Pr. (edit. 1726,) p. 35, § 99.
(*c*) Hope's M. Pr. p. 36, § 102.
(*d*) See Ross, l. 43-4.
(*e*) 1641, c. 57; ratified by 1661, c. 32.

198. PASSES INTO THE HERITABLE BOND.—The Reformation was the period from which the forms of heritable and moveable rights, thus flowing from the same source, began to assume a more perfect style. In the original form of the annualrent right the borrower had a right of redemption; it had now become lawful for the lender to stipulate that the

money should be paid back on requisition, a form equally applicable to wadsets as to annualrent rights. The latter were thus no longer wadsets or impignorations of a yearly sum payable from land, but avowedly securities for borrowed money; and the annual interest being payable upon a loan, was not subject to any share of the public burdens of the land as the annualrent had been. Finally, the form of requisition, which, (as the law did not permit recourse both on the lands and the goods of the debtor,) changed the nature of the right from heritable to moveable, without affording direct access to the debtor's moveables, gave place to the personal obligation. Statute (*a*) had, in the meantime, introduced execution against the person; and the practice becoming general of inserting in securities a clause, declaring that the personal obligation should be without prejudice of the real rights and infeftments (*b*), the notion gradually obtained, that execution against the moveables and the person was not incompatible with process against the lands (*c*), and thus the annualrent right passed into the heritable bond.

(*a*) 1592, c. 140, 142.
(*b*) See Jur. Styles, 1. 307.
(*c*) Erak. 2. 2. 16; Douglas, 26th Nov. 1751, M. 5576, 5 B. S. 793.

TITLE III. THE HERITABLE BOND.

199. INTRODUCTORY REMARKS.—(1.) The heritable bond being a disposition of heritable property in security of money, is, in a feudal sense, a deed of transmission. In its modern shape it differs considerably from the form in use in the middle of the 17th century. Dallas gives two forms of what he styles the heritable bond; one the proper annualrent right, with a clause of requisition; the other approaching in structure to the modern bond, in having an obligation of repayment, and likewise to infeft the creditor in the lands themselves, but without any mention of an annualrent. The right in either case was qualified by a clause of redemption in favour of the debtor, available on payment of the principal sum, interest and liquidate expenses. A third form is de-

scribed by Dallas, but not exemplified, which bore an acknowledgment of the loan, but not an obligation to repay, and warranted infeftment in the lands themselves, as in the second example. It contained also clauses of requisition and redemption. The modern bond is a happy combination of these forms. The loan is acknowledged, and a personal obligation added for its repayment, with interest and penalty. The debtor, either *verbis de præsenti*, conveys to the lender an annualrent out of the lands corresponding to the principal sum, and likewise the lands themselves, in farther security of the sums expressed in the personal obligement, or he binds himself to infeft the lender in an annualrent and in the lands themselves. In the former shape of the deed it contains a proper dispositive clause; in the latter, only an obligation to infeft; but in both there is a precept for actual infeftment (*a*). (2.) The introduction of infeftment in the lands themselves, to us a very marked improvement in the form of rights of annualrent, and borrowed from the wadset, was probably, in a great measure, owing to the severe penalty which the heir of an annualrenter was subjected to when the annualrent right happened to fall in non-entry; for as the right was retoured *valere seipsum*, when the ancestor was publicly infeft (*b*), the non-entry duty, even before citation, was the amount of the annualrent. It was not till the year 1760 that superiors were restricted to the blench, or other duties mentioned in a bond or infeftment of annualrent, until after citation in the general declarator of non-entry (*c*).

(*a*) Dallas, p. 694-701; Jur. Styles, 1. 286, and fol.

(*b*) Dallas, p. 701; Ross, 2. 377.

(*c*) 1690, c. 42. Our Sovereign Lord and Lady CONSIDERING that infeftments of annualrents which ordinarily are granted to creditors for security of sums of money are retoured to be worth the full value of the annualrent and thereby superiors do acclaim the full annualrent as the retour-duty, during the non-entry as well before as after declarator which is a grievous and heavy burden to the heirs of creditors Therefore their Majesties with consent of the Estates of Parliament do STATUTE ENACT and DECLARE that in all time coming annualrents shall only be retoured to the blench-duty or other duty contained in the heritable bond or infeftment of annualrent, and that no action of special declarator at the instance of any superior of an annualrent shall be sustained further than for the blench or other duty contained in the bond or infeftment of annualrent until citation in the general declarator.

200. CLAUSES OF THE BOND.—The heritable bond, in the most approved form, consists of the following clauses: viz. The *narrative; obligation to repay; conveyance of an annual-rent; dispositive; obligation to infeft; procuratory of resignation; clause of absolute warrandice; obligation to enter the creditor's heirs; assignation to the writs and rents; clause of registration; precept of sasine, and testing clause.*

201. NARRATIVE (*a*).—The introductory clause receives the name of narrative or inductive, as describing the granter or borrower by name, surname and addition, and expressing the cause of granting, which is the receipt of the money constituting the loan. (1.) The terms of the clause ought to import a *de præsenti* acknowledgment. Securities for *prior* debts are made subject to challenge by creditors (*b*), in the event of the bankruptcy of the debtor within sixty days from their dates; and on the other hand, the same statute annuls securities for *future* debts, "or such debts as shall be found to be contracted after "the sasine or infeftment following on the right." The ordinary and proper words of style are, "instantly borrowed and "received." This act (see *Bonds of Credit and Relief*) struck at securities for cash-accounts with bankers. (2.) In interpreting the statute, it is held that sums advanced *after* the date of the bond, but *prior* to the completion of the right by registration of the sasine, are validly secured (*c*). (3.) The words, *renouncing all exceptions to the contrary*, added to the acknowledgment of the money, is a remains of the ancient style of the heritable bond, from which this part of the moveable bond is derived. In the form given by Dallas (*d*), the introductory clause is expressed as in the notes; but, since his time, it has been much simplified. This arose perhaps from our law rejecting the fictions, which a large portion of the clauses of the Roman obligation were intended to exclude. In Mr Dallas's form, the words are, "renouncing the exception of "not numerat money and all other exceptions and objec-"tions of the law whatsoever;" but the renunciation was originally of much greater length, and was introduced to exclude the pleas competent to a debtor by the civil law (*e*). That of not numerate money was an exception available to a party

who granted an obligation without receiving the specified sum by count, within a certain period after the date of the writ, unless expressly discharged; but there is no evidence in our law books that it ever came to be recognised in Scotland. As a party granting an acknowledgment for money is presumed to have received the admitted sum, or value equivalent to it, until he establishes the falsehood of the document, the words, *renouncing all exceptions to the contrary*, are mere surplusage. (4.) The concurrence of one as a consenter, who possesses a prior security, does not import a conveyance of his right to the creditor, but a *non repugnantia*,—a departure from his preference in a question with his creditor (*f*).

(*a*) I A. grant me instantly to have BORROWED and RECEIVED from B. the sum of £. sterling whereof I do hereby acknowledge the receipt renouncing all exceptions to the contrary.

(*b*) 1696, c. 5. (*Excerpt.*) "His Majesty with consent of the Estates of "Parliament DECLARES all and whatsoever voluntar dispositions assignations or "other deeds which shall be found to be made or granted directly or indirectly "by the foresaid dyvor or bankrupt either at or after his becoming bankrupt or "in the space of sixty days of before in favour of any of his creditors either "for their satisfaction or farther security in preference to other creditors to "be void and null LIKEAS it is DECLARED that all dispositions heritable bonds "or other heritable rights whereupon infeftment may follow granted by the "foresaid bankrupts shall only be reckoned as to this case of bankrupt to be of "the date of the seasin lawfully taken thereon but prejudice to the validity of "the said heritable rights as to all other effects as formerly AND because infeft-"ments for relief not only of debts already contracted but of debts to be contracted "for thereafter are often found to be the occasion or covert of frauds it is "therefore farther DECLARED that any disposition or other rights that shall "be granted for hereafter for relief or security of debts to be contracted for "the future shall be of no force as to any such debts that shall be found to be "contracted after the seasin or infeftment following on the said disposition or "right but prejudice to the validity of the said disposition and right as to other "points as accords."

(*c*) Dunbar's Crs. 30th July 1789, M. 1156.

(*d*) Dallas, p. 1.

(*e*) Ross, 1. 53.

(*f*) 6 Buchan, 12th July and 11th Dec. 1739, Elch. *Clause*, 2; M. 6528.

202. OBLIGATION TO REPAY (*a*).—1. *Principal and interest.*—(1.) This clause is expressed in the terms of a personal bond, with this only difference, that in the latter it is not usual to annex a penalty to the termly payments of interest. The interest is at the legal rate, or such lesser rate as may

be agreed on; and although the Court may, *ex equitate*, award compound interest to a creditor in a heritable bond, as against the debtor, a power which is in their discretion, the burden on the subjects can never exceed the principal with simple interest, since the terms of the obligation are the precise measure of the feudal right. When the interest is meant to be restricted, the obligation may be expressly qualified (*b*); but it is more usual in practice to limit the rate of interest by a relative missive or letter. (2.) Interest on heritable as on moveable bonds is due *de die in diem*, from day to day; and accordingly, when a bond is paid up between terms, interest is calculated till the period of actual payment. There seems, indeed, to be no real distinction in meaning between the words *yearly, termly and continually*, employed in the obligatory clause of the moveable bond, and those of *termly and proportionally*, inserted in the same clause of the heritable bond, although the rules of payment after the creditor's death are different. Arrears of interest on a moveable bond due to one who dies between terms necessarily follow the principal sum into the hands of his executors. In heritable bonds, again, the interest current at the period of the creditor's death goes to his heir and not to his executor, because, though partly *due*, it is not *payable* until the next succeeding term specified in the bond, and is therefore not considered *in bonis defuncti*, part of the creditor's moveable effects, which his executors can take by confirmation. But although the current interest on heritable bonds thus, to a certain extent, follows the same rule with the current rents of lands, in a question between the heir and the executors of the deceased proprietor, there seems to be no room for holding the rights of the representatives of a heritable creditor to be in any circumstances controlled by the occurrence of the legal terms of Whitsunday and Martinmas, as are those of the heir and executors of a proprietor of land. Forehand or postponed interest is unknown in practice. Interest is not due for years and crops, but according to time and for the use of money; and the simple rule appears to be, that what is *payable* goes to executors, and what is still *current*, to the heir (*c*).

2. *Penalty*.—(1.) The penalty in heritable bonds is not

of the nature of an indefinite or unknown incumbrance; being stated as a fifth of the principal sum or interest, which it cannot exceed, the utmost extent of the burden appears on the register. And although the penalty is subject to restriction to *necessary expenses*, this flows from the equitable powers of the Court, and is not a consequence of the penalty being an illegal stipulation (*d*). But a creditor by heritable bond, although infeft, can claim the penalty to no greater extent than a personal creditor (*e*). (2.) Necessary and reasonable charges, or as Stair (*f*) describes them, the *real expenses and damages of parties*, comprehend the expense of diligence or other proceedings necessary in defending the right, or proper for recovering or rendering the debt effectual, according to the form of the security; and they have been held not to include the costs of recovering the contents of a collateral security. In a multiplepoinding or ranking they are added to the principal sum (*g*). The rule, that expenses of process, incurred in discussing points connected with the security, or even defending the right, do not fall within the obligation, since expenses, when justly incurred, are usually awarded against the opposing party, seems to be limited to questions between the creditor and debtor. In a recent case the penalty was held to cover law expenses necessarily incurred in maintaining the preference of the security against another heritable creditor, and that although the Court had not found expenses due in that litigation; but such questions depend mainly upon circumstances (*h*). Extrajudicial expenses, when necessarily laid out, are favourably regarded (*i*). (3.) Even where the creditor has led an adjudication upon his bond, the equitable interference of the Court is said not to be excluded. A creditor-adjudger is allowed a fifth of the debt on account of his taking land for his money (*k*); and although the enactment applies only to *special* adjudications, the Court have permitted the creditor in a bond to rank under the *general* adjudication for the penalty, if it do not exceed a fifth of the sum, as the only mode known in practice of rendering an adjudication special; but a different rule is said to have been recognised in a later case (*l*). (4.) A penalty which exceeds a fifth part of the principal is exorbitant, and exorbitant penalties may be re-

stricted even after adjudication (*m*). (5.) The penalty in bonds and contracts for sums of money is thus regarded as a means of enforcing payment, and indemnifying the party for expenses necessarily occasioned, and does not come in place of the obligation itself, even where the words, *over and above performance*, are omitted (*n*). (6.) In the old annualrent right, although it was usual to insert a penalty, it could not form a real burden upon the lands, and affected merely the right of redemption when exercised by the debtor (*o*); and thus, in competition with other creditors, the heritable bond gives an advantage which did not belong to the creditor in the annualrent right. In order to obtain the full benefit of the penalty, a declaration may be introduced, as in the notes (*p*).

(*a*) WHICH SUM of L. sterling I hereby BIND and OBLIGE myself and my heirs executors successors and representatives whomsoever and that without the necessity of discussion to repay to the said B. and his heirs or assignees at the term of next with L. (*a fifth part*) sterling of penalty in case of failure and the legal annualrent of the said principal sum from the date hereof to the said term of payment and termly and proportionally thereafter during the not payment of the same And that at two terms in the year Martinmas and Whitsunday (*or any others agreed on*) by equal portions beginning the first term's payment of the said annualrent at the term of next for so much annualrent as shall then be due and the second term's payment at next and so forth half yearly thereafter during the not payment of the said principal sum with L. sterling of penalty for each term's failure in payment of the said annualrent.

(*b*) Jurid. Styles, 1. 297.

(*c*) Ersk. 2. 9. 66; Bell's Princ. 1049; Murray Kynnynmound, 6th Nov. 1739, M.15,906. See Henderson, 8th Jan. 1624, M. 15,878; Lindsay, 10th March 1630, M. 5569, 15,881; Lord Daer, 27th Feb. 1740, B. S. 5. 695.

(*d*) Duff, 19th Feb. 1755, M. 10,046.

(*e*) Macadam, 25th July 1787, M. 10,051.

(*f*) Stair, 4. 3. 2.

(*g*) Gordon, 27th Nov. 1761, M. 10,050; Creditors of Jarvieston, 24th June 1782, M. 14,132; Mein, 26th May 1829, F. C., 7 S. 653; Jameson, 4th June 1835, 13 S. 865.

(*h*) Bell's Com. 1. 657; Allan, 23d Dec. 1757, M. 10,047; Smith, 3d June 1800, M. App. *v. Expenses*, 2; Ramsay, 22d June 1826, 4 S. 737; Mein, as above. See Allardes, 19th June 1788, M. 10,052.

(*i*) Hynd, 30th May 1826, 4 S. 628.

(*k*) 1672, c. 19.

(*l*) Macadam, as above. See Bell's Com. 1. 657, and note 11, on the case of Buchanan, 20th Jan. 1801, M. App. *v. Adjudication*, 12.

(*m*) Porteous, 23d Nov. 1783, M. 120; Stair, 3. 2. 32.

(*n*) Beattie, 27th Dec. 1695, M. 10,039; Broomfield, 11th Aug. 1753, M. 9446.

(*o*) See Creditors of Jarvieston, as above.

(*p*) DECLARING as it is hereby expressly PROVIDED and DECLARED that the penalty before expressed shall over and above the sums by law comprehended under the liquidate penalty in heritable bonds include the necessary charges specified in the clause of redemption herein contained.

203. CONVEYANCE OF ANNUALRENT (*a*).—The third clause gives the creditor right to an annualrent out of the lands corresponding to the interest of the borrowed money, but under reversion, with penalty and termly failures.

(*a*) And for further security to the said B. and his foresaids of the payment of the said principal sum interest thereof and penalties to both annexed if incurred and without prejudice to the before-mentioned personal obligation on me the said A. but in further corroboration thereof I hereby sell alienate and dispone to the said B. and his foresaids heritably but under reversion in manner after written not only ALL and WHOLE an annualrent of £. sterling or such other annualrent less or more as by law for the time shall correspond to the said principal sum of £ yearly to be uplifted at the said two terms of Martinmas and Whitsunday by equal portions with the penalty and termly failures before specified and beginning the first term's payment as aforesaid furth of ALL and WHOLE (*describe the lands,*) or furth of any part or portion of the said lands and others, or readiest rents and duties thereof.

204. DISPOSITIVE CLAUSE (*a*). — 1. *Right to possess.* — (1.) By this clause the lands are conveyed to the creditor in real security, and as described in the title-deeds. The words, *with all right, title and interest,* ought to be introduced after the description. Considerable weight has been given to them in a question, whether the reversionary interest under a trust had been conveyed by a heritable bond (*b*). (2.) This conveyance of the lands forms the leading feature by which the heritable bond is distinguished from the annualrent right, as in virtue of his infeftment in the lands themselves the lender may enter into possession, and impute the rents not merely to the interest, but to the principal sum. In this respect, the modern security resembles the improper wadset under which the creditor was accountable for his intromissions, whereas the annualrent right was not a title to pursue a personal action against tenants, unless it contained an express assignation to maills and duties. The remedy was by poinding of the

ground, which is competent also to a creditor in modern securities, and that to the fullest extent as against the proprietor when in the personal occupation of the subjects, and as against tenants, to the extent of the rents due and current at the time; but after entering into possession the creditor has those remedies only which are competent to a landlord against his tenants, viz. sequestration, personal action and common poinding. The creditor has no lien over the moveables on the ground, in virtue of which they can be attached to the exclusion of an ordinary poinding creditor; he must use the forms proper to the circumstances, viz. poinding of the ground so long as the debtor remains in possession, either as a personal occupant or by his tenants, and sequestration after he himself has assumed possession (*c*). (3.) Possession is obtained by the lender by means of an action of maills and duties, which operates as a judicial transference of the landlord's rights: the publication of his sasine by registration is insufficient to put the tenants *in mala fide* to pay to their landlord, whose right is only incumbered—not taken away by his creditor's infeftment (*d*). He may also set tacks, whether to the debtor or others, and remove tenants; but he is accountable for his intromissions, without deduction of factor fee or personal expenses in a question with postponed creditors (*e*).

2. *Feudal right an accessory.*—(1.) The consequence of the various facilities conferred on heritable creditors for the recovery of their debts has been to introduce the doctrine, that the feudal right is accessory merely to the personal obligation in the bond. After the style of the annualrent right was changed by incorporating with it the personal obligation, it was subject to become a mere moveable right by a charge against the debtor, which loosed the infeftment, and by means of which the debt might be recovered (*f*). It was likewise competent for the creditor to poind the ground for the annualrent to the extent of the current rents, which might amount to a larger sum than the interest actually due; whence it followed, that unless the superplus were imputed to the principal, the debtor would have incurred the risk of double payment when the creditor chose to assign away his security. It came thus to be held, that annualrent rights in

security of personal obligements might be extinguished or restricted by recovering sums by means of diligence, without the necessity of express renunciation (*g*); and the rule was extended to payment by intromission (*h*). (See *Discharge and Renunciation.*) The principle thus introduced became still more applicable as the forms of heritable securities advanced to perfection, the introduction of infeftment in the lands themselves increasing the means which the creditor possessed of recovering payment of the loan. Our modern bonds are thus substantially personal obligations for money and its interest, fortified by a conveyance of lands in real warrandice, the heritable security being never broader than to cover the actual balance of principal and interest, as warrandice lands secure only against eventual loss. (2.) A singular successor in a right in security cannot therefore trust solely to the appearance of the creditor's sasine on the register (*i*). (3.) The effect of the above doctrine on a joint security, where the same subjects are conveyed in one and the same bond to two or more creditors in separate debts, is peculiar. The discharge of one of the debts by payment or otherwise, extinguishing the infeftment of that creditor to whom it was due, the security of the others becomes enlarged; whereas by a joint conveyance in fee, each disponee acquires right to a share of the common subject, which cannot be increased by the death of one, unless there is a substitution of the survivors (*k*).

3. *Security over feu-duties.*—Considerable variation in the terms of the dispositive clause, as well as in the other clauses of the deed, will take place where the subject of the security consists of feu-duties. A security of that nature may be constituted in several modes. (1.) The lands may be conveyed in security precisely as in the ordinary case, under an exception from the warrandice of the existing feu-rights. In this manner the right of superiority is directly burdened. This form has been sanctioned by the Court (*l*.) (2.) The feu-duties may be directly conveyed in security, with a precept of sasine (*m*). (3.) They may be conveyed by disposition and assignation, the intimation of which will complete the right. The first of these methods appears the most advisable, and the third the least secure.

(*a*) BUT ALSO ALL and WHOLE the said lands and other heritages with the pertinents and writs evidents rights titles and securities of the same all in real security to the said B. and his foresaids of the said principal sum interest thereof and penalty and termly failures before mentioned.

(*b*) Paul, 22d May 1835, F. C., 13 S. 818.

(*c*) Gray, 24th March 1626, M. 565; Kinloch, 5th July 1701, M. 569; Garthland, 2d March 1632, M. 10,545; Ersk. 2. 8. 32-3, and 4. 1. 49; More's Notes on Stair, ccxi; Lord Corehouse in Railton, 20th June 1834, F. C., 12 S. 757, and author. cit.

(*d*) E. of Lothian, 11th July 1634, M. 14,087.

(*e*) Kildonan, 16th June 1785, M. 14,135.

(*f*) See Stewart, 18th Jan. 1665, 5587-9; Douglas, 26th Nov. 1751, M. 5577, Kilk. Report.

(*g*) Ersk. 2. 8. 34; Ranken, 8th July 1680, M. 572.

(*h*) Baillie, 25th Jan. 1711, M. 9990.

(*i*) Jurid. Styles, 1. 352.

(*k*) Blackwood, 7th Nov. 1740, M. 14,140.

(*l*) Home, 22d Jan. 1794, M. 15,077.

(*m*) Fraser's Trustees, 9th Feb. 1790, M. 16,553.

205. OBLIGATION TO INFEFT (*a*) — (1.) This clause is alternative as in the disposition of sale, and its effects upon the precept of sasine are similar. Thus, where the holding is not alternative but *a me* only, the creditor must obtain confirmation in order to validate his infeftment in competition with third parties having completed rights (*b*). The same rules apply likewise when the debtor is in apparency, or holds a mere personal right to the lands; (§ 138. 2, 3); but in practice lenders transact with those only whose title is feudally complete. It is said, indeed, to be inconsistent with the principle on which the doctrine of accretion is founded, that after bankruptcy, or when it is completed by a trustee for creditors, the debtor's title should accresce to a security which would otherwise be ineffectual (*c*). But it is manifest that the circumstances in which the application of that doctrine was extended to securities for debt could only have occurred where the common debtor was bankrupt (*d*); and besides, if it is admitted, as seems to be done by the same learned author, that the doctrine is founded on the obligation of warrandice, it must be kept in view that such obligation is undertaken not when the title of the debtor is completed, but in the prior conveyance granted by him when solvent. Nor is there any hardship in the doctrine to postponed heritable creditors, or to the per-

sonal creditors of the bankrupt, for although in one sense founded in equity, it can operate only in favour of a party who has a duly registered sasine. It is therefore a practical rule, that a trustee for creditors shall complete his infeftment in such a manner as to avoid that situation of the title in which alone accretion can take effect. (See *Adjudications.*) (2.) Where a party has advanced money on the faith of receiving heritable security from a proprietor whose title is not made up, it is expedient that the bond should be immediately executed, and contain a procuratory for expeding a service and completing the title; for by his bankruptcy the debtor's power to grant a mandate in favour of the creditor, or even to subscribe a claim of service, expires, as he would thus be doing a voluntary act, which might confer a preference on a creditor whose right is only personal, to the prejudice of his other creditors (*e*). (3.) Although the obligation to infeft is alternative, it is not usual for the creditor to enter with the superior. The right in security is a mere offshoot from the fee, which does not affect the title to the principal subject; and as it may safely be held of the debtor for an elusory blench-duty, the case can seldom occur where it is necessary to complete a public right. But for this purpose it is enough to have an alternative obligation to infeft, and an indefinite precept of sasine. Instances may occur where lenders, by obtaining bonds with an *a me* holding only, find it necessary to resort to the superior. In that event it is essential to observe, that confirmation must be obtained, as well of the debtor's infeftment of property, if he is not entered with the superior, as of the creditor's right in security (*f*).

(*a*) Above, p. 206.

(*b*) Rowand, 30th June 1824, F. C., 3 S. 196; Struthers, 2d Feb. 1826, F. C., S.; M'Nair, 16th Feb. 1827, F. C., 5 S. 372.

(*c*) Bell's Com. 1. 699.

(*d*) See Creditors of Gordon, 22d Dec. 1738, M. 7773; Paterson, 10th Dec. 1742, M. 7775.

(*e*) Paul, 22d May 1835, F. C., 13 S. 818. See Mansfield, 28th June 1833.

(*f*) See Henderson, 5th July 1821, F. C., 1 S. 103.

206. PROCURATORY OF RESIGNATION (*a*).—This clause, although usually introduced in the complete style of the bond,

is seldom of any practical use. In its place may be inserted a general obligement to grant all necessary deeds for completing the creditor's title.

(*a*) See Jurid. Styles, 1. 289; above, p. 208.

207. CLAUSE OF WARRANDICE (*a*).— Warrandice in the heritable bond, as observed by Mr Ross, seems to be superfluous. The proper annualrent right was a purchase of so much yearly out of lands; and although the debtor might restore the price in order to relieve his property of the burden, there was in the original form of the security no obligation to repay. But in the heritable bond, the loan, which is the measure of the right, is, with its interest, warranted by the personal obligation of the debtor, which, unless there were a conveyance of other subjects in real warrandice, is as broad as the warrandice of the lands, the latter being a mere personal undertaking to satisfy the creditor for any loss which may occur. This clause is, however, generally introduced.

(*a*) WHICH ANNUALRENT upliftable out of the lands and others above mentioned and said lands and others themselves and infeftments to follow hereon I bind and oblige me and my foresaids to warrant to the said B. and his foresaids at all hands and against all deadly.

208. OBLIGATION TO ENTER HEIRS (*a*), &c.—By this undertaking all questions between the debtor as superior, and the creditor as his vassal, are determined in favour of the latter, to whom the casualties of superiority are discharged. It is recommended, in place of a mere discharge introduced in this part of the deed, to add the words in the notes (*b*) at the end of the dispositive clause, which is the proper part of the deed for relieving a feudal subject of claims which are natural burdens on the right of superiority.

(*a*) AND FURTHER in case it shall please the said B. to hold the said annualrent and lands and others before disponed of me and my foresaids I hereby bind and oblige myself and them to enter and receive the heirs and singular successors of the said B. and his foresaids as vassals to us in the same and to infeft and seise them therein without any composition or gratuity whatever all non-entry and relief duties and claims of compposition or other casualties of superiority being hereby expressly and for ever discharged.

(*b*) And I do hereby RENOUNCE and DISPONE from me and my foresaids to and in favour of the said B. and his foresaids the whole casualties of the said lands and others and of this right thereto which may fall to us as superiors thereof in name of liferent escheat non-entry relief or composition of heirs and singular successors which are hereby for ever discharged.

209. ASSIGNATION TO RENTS (*a*).—The conveyance of the rents to the creditor gives no broader right than is conferred by the dispositive clause. A creditor does not trust to this clause, but takes immediate infeftment.

(*a*) Above, p. 94.

210. ASSIGNATION TO WRITS,—1. *Effect of the ordinary clause.*—The assignation to the title-deeds is usually granted with reference to a particular inventory delivered to the creditor, and the writs are not in practice put into his possession, unless it is stipulated that he shall have the custody of them. The clause is, however, absolute in its terms, and may, in particular circumstances, be of use for the preservation of the titles, or in enabling the lender, in the event of the debtor's insolvency, to prevent the acquisition of a right of hypothec over them. It must, however, be conceded, that there is much difficulty in holding, that a creditor who did not at the outset stipulate for the custody of the title-deeds, should have the power, at his own pleasure, of forcing the debtor to yield the possession of them. The debtor, as proprietor of the subjects, is the proper custodier of the writs whereby the radical right, on which the security is a mere burden, has been completed, and must, if challenged, be defended; and he may have occasion to use them in obtaining other loans over the property, or for raising money to pay off this very creditor's debt. The Court have accordingly held, that an application by the lender to have the title-deeds of the subjects *given and delivered to him, to be used and disposed of by him as his writs and evidents*, is too broad, but without throwing any doubt on the lender's right to adopt measures for their preservation, or to have them adequately protected against becoming burdened with a right of lien (*a*).

2. *Lien over title-deeds.*—The interpretation given to this clause in its ordinary form, as stated above, may render

it prudent for a lender, when the value of the subjects does not greatly exceed the loan, to introduce an express stipulation that he shall have the custody of the title-deeds, in order to prevent the constitution of a lien over them in favour of the borrower's agent. It is necessary briefly to explain the nature of that burden. (1.) The hypothec of a law-agent, which is properly a right of lien or retention, extends over title-deeds and securities placed in his hands by or with the consent of the proprietor of the subjects, or the heir of a fee-simple proprietor in actual possession on his apparency, unless forming steps of a depending process (*b*). It does not affect the title-deeds of entailed subjects beyond the life-interest of the proprietor of entail on whose employment the business is performed; and as the title-deeds follow the subject, it is not pleadable against a creditor of the entailer adjudging the estate from a future heir (*c*). Nor does employment by a company give a right to retain the title-deeds of an individual partner (*d*). (2.) The agent's security is for his proper business account, and the necessary disbursements made in course of the agency, although unconnected with the subjects to which the writs relate. Payments in cash are thus excluded. These seem to embrace, not only proper cash-advances, but also sums paid for advertising, or disbursed in payment of feu-duties, casualties of superiority, composition to a superior, inventory and legacy duties, and the like (*e*); but not sums advanced in name of expenses, by one agent to another, at concluding a loan transaction (*f*). It is said that remuneration in the shape of a yearly salary to the agent is not covered by the lien; but the case referred to appears to have proceeded on specialties (*g*). The lien does not operate for relief from cautionary engagements (*h*). (3.) The subjects themselves are not affected by the lien, which is a mere personal claim, depending on the subsistence of the account on which it is founded (*i*): it is thus not an active title to sell the lands or attach the rents, but only to claim in a ranking or sequestration (*k*). (4.) The agent's security is therefore essentially negative. As against his client and his personal creditors, and even creditors having real rights whether prior or subsequent

in date to the account, or others having claims on the subjects or their price, he may retain the title-deeds until he receive either payment of or security for his account (*l*); or obtain an effectual finding in a process of ranking, or a warrant on the factor or trustee in a sequestration (*m*); or at least a reservation in a sequestration of the full effect of his hypothec (*n*). (5.) The agent has thus a material interest to refuse even inspection of the writs, and this he may do absolutely in questions with the client or those deriving right from him, (unless some one of the above conditions be conceded,) even where production is demanded only *in modum probationis* (*o*); but a party having an opposing interest to that of the client, or a substitute of entail, may force production of them (*p*). (6.) The lien of a country agent covers his responsibility for the accounts of other agents, whether in Edinburgh or the country, incurred by the instructions of the client (*q*). (7.) The agent's right is not lost by his producing the title-deeds in a process, or sending them to another agent at a distance for necessary purposes (*r*). Nor is it waived by his accepting a bond, bill, or other additional security for the amount of the claim (*s*).

(*a*) M'Neill, 17th Nov. 1835, F. C., 14 D. 14.

(*b*) Ersk. 3. 4. 21; Bell's Princ. 1438, *et seq.* and cases cited; Callman, 28th Nov. 1792, M. 6255, and case referred to; Cameron, 25th June 1824, 3 S. 176.

(*c*) Callender, 11th Feb. 1834, F. C., 12 S. 417.

(*d*) Skinner, 21st May 1823, 2 S. 354.

(*e*) Bell, as above, and cases; Bell's Com. 2. 112, 117; Creditors of Liddesdale, 5th July 1749, M. 6248. The report bears, that "the Lords generally attested, that in their practice in rankings, the agent's right to retain till paid of his account was always admitted; and as it was a creation of the Court introduced for the agent's security, who otherways would not undertake the affairs of a person in doubted circumstances, which sometimes might be a loss even to his creditors, so, if it was only good against his employer, it would in most cases be good for nothing."—Skinner, as above.—See Guthrie, 3d Feb. 1830, 8 S. 435.

(*f*) Inglis, 23d June 1825, 4 S. 113.

(*g*) Bell's Princ. 1438; Cuthberts, 1st July 1697, B. S. 4. 374.

(*h*) Grant, 28th Feb. 1801, M. App. *v. Hypothec*, 1.

(*i*) Foggo, 22d Dec. 1780, M. 6252. See M'Callum, 25th Jan. 1833, 11 S. 321.

(*k*) Ranking of Provenhall, 9th Aug. 1781, M. 6253; Linning, 27th June 1821, 1 S. 87.

(*l*) Bell's Princ. 1442; Ranking of Provenhall, as above; Campbell and Clason, 15th Nov. 1822, F. C., 2 S. 16; Dobie, 19th May 1831, F. C., 9 S. 609.

(*m*) Newlands, 9th Feb. 1793, M. 6254; Hotchkis, (estate of Bertram, Gardner and Co.,) 16th Jan. 1794, M. 6256; Bell's Cases, 1.

(*n*) Johnstone, 23d Jan. 1823, 2 S. 144; Paul, 2d Feb. 1826, 4 S. 420.

(*o*) Finlay, 23d Jan. 1773, M. 6250.

(*p*) Bell, as above; E. of Sutherland, 31st Jan. 1738, M. 6247; Stewart, 29th Jan. 1742, M. 6248; Murray, 2d Dec. 1829, F. C., 8 S. 161.

(*q*) Walker, 8th June 1831, F. C., 9 S. 691.

(*r*) Bell's Princ. 1440; Com. 2. 112; Callman, 28th Nov. 1793, M. 6255.

(*s*) Ayton, 23d Nov. 1705, M. 6247; Linning, as above; Skinner, as above. See M'Creadie, 16th Feb. 1822, 1 S. 330.

211. CLAUSE OF REGISTRATION (*a*).—1. *History.*—This important part of the bond is derived by Lord Kames from the English warrant to confess judgment. Mr Ross (*b*) again deduces the clause of registration from the deeds of consent to excommunication common in the church courts in the fifteenth century, on which *letters of cursing* passed, and were, with the letters of caption following on them, almost the only compulsitor of payment till the Reformation, when the form was abolished by the Lords of the Congregation. Deeds came then to be produced for decree in the ordinary civil courts, and this took place in presence of the Judge. There was at that early period no regular registry of deeds: they were the warrants for summary decrees, and were preserved among the ordinary records of Court. But the system was by degrees improved and simplified, until the appearance in court of the advocate or procurator for the party gave place to the simple form of presenting the deed to the clerk of Court. For a long period, however, the clause was still looked upon as a mere mandate, which, according to a rule introduced from the civil law, expired on the death either of the granter or creditor, and was incapable of being assigned to the effect of authorising registration after the death of the latter, even although the assignation had been intimated during his lifetime (*c*). When the mandate expired, an *action of registration*, as it was called, became necessary (*d*). This inconvenience was removed, as regarded the creditor, by a statute which permitted registration to pass summarily on production of the title of the holder of

the obligation, whether the heir, executor or assignee of the original creditor; and, by a subsequent statute (*e*), it is declared, that *all bonds, dispositions, assignations, contracts and other writs registrable*, may be registered after, in the same manner as before the granter's death. In practice, the provision of the former of these acts, in regard to the production of the title of the party in right of the obligation, is disregarded, and deeds are registered, on being produced to the keeper of the register, as a matter of course.

2. *Meaning of the terms.*—The form of the clause of registration in use in Dallas's time is much simplified in modern practice. The words, "*and for the more security*," are now superfluous: it is no longer the decree, but the diligence on it, which gives a preference to the creditor in competition (*f*). The words, *in the books of Council and Session or others competent*, were introduced about the year 1650. Prior to that period the clause specified the different courts in which registration was authorised, whereby the debtor prorogated their jurisdiction; and the Court, after the introduction of the general terms, held all those courts to be competent for registration, which had by the former practice been enumerated (*g*). But this view was changed, and registration found incompetent, except in the jurisdiction where the granter resided (*h*). A question then occurred with regard to the competency of the books of the Commissaries without special consent, even where the debtor resided within the particular commissariat, which was ultimately determined in their favour, and the decision was followed up by two Acts of Sederunt (*i*). Thus, the books of the Supreme Court, (of Council and Session,) and of the inferior courts of the sheriffs and commissaries, and of royal burghs, are all competent for registration under the clause as usually expressed; but those of the inferior courts only when the obligants are, at the time, subject to their jurisdiction. The words, *therein to remain for preservation*, are of modern introduction, and entirely unmeaning, as the registration for execution necessarily implies the preservation of the deed. The real object of registration is expressed in these words, *that letters of horning on six days' charge*, &c. may pass upon *a decree to be interponed hereto.*

The days of charge have remained the same in obligations for a long period, and no attempt appears to have been made to limit them. Fifteen days are the *inducíæ* in ordinary decreets, and are called the *days of law:* they are applicable to clauses for registration in which no period is specified. Although the clause of registration still contains a blank for the name of the procurator, and the extract issued by the keeper of the register bears his name, and states his appearance, the act of registration is a mere fiction.

3. *Effect.*—The diligence warranted by the clause of registration against the person and moveable property of the debtor is, according to the modern notion, not incompatible with the subsistence of the security over the lands, (above, § 198,) and it no longer renders the debt moveable (*k*). The forms employed in putting the decree of registration in force will be found in the Juridical Styles (*l*).

(*a*) *(Clause from Dallas,* p. 1. and 697.) And for the more security we are content and consent thir presents be insert and registrat in the books of Council and Session or others competent to have the strength of an decreet of the Lords or Judges thereof interponed thereto that letters of horning on six days and others necessar in form as effeirs may be direct hereupon; and to that effect constitutes our procurators &c.

(Modern Clause, Jurid. Styles, 1. 295.) And I consent to the registration hereof in the books of Council and Session or others competent therein to remain for preservation and that letters of horning on six days' charge and all other lawful execution may pass upon a decree to be interponed hereto in common form; and thereto constitute my procurators.

(*b*) Ross, 1. 96, and fol.

(*c*) Channel, 16th Feb. 1693, M. 839.

(*d*) Ersk. 4. 1. 63.

(*e*) 1693, c. 15; 1696, c. 39.

(*f*) See Ross, 1. 112.

(*g*) Douglas, Feb. 1674, B. S. 3. 47.

(*h*) Morris, 21st July 1677, M. 7426.

(*i*) Comm. of Edin. 16th Dec. 1748, Elch. *v. Register,* 8; A. S. 17th Dec. 1748, and 29th July 1752.

(*k*) Ersk. 2. 2. 16.

(*l*) Jurid. Styles, vol. 3.

212. PRECEPT OF SASINE (*a*).—(1.) In this clause, which in other respects presents nothing peculiar, are in correct practice inserted the power and mode of redemption, in order that they may be transferred to the instrument of sasine and

the register. It is customary, likewise, to introduce a declaration, that the creditor, by entering into possession, shall not become liable for more than his actual intromissions with the rents. Doubts have been thrown upon the effect of such a declaration, in a question with postponed creditors, on the authority of a case (*b*), where a clause in more comprehensive terms was held not to entitle the creditor to deduct the salary of a factor, and payments for personal expenses. But these were disallowed, on the ground that a heritable creditor entering into possession is to be viewed as a temporary proprietor; and it does not necessarily follow, that because he must account for all he receives, without deduction of expenses incurred in avoiding personal trouble, he ought to be debited with more than he has actually drawn, unless where gross negligence is established. The declaration under which the creditor acts is granted by a party having at the time full control over the subject; and after its publication in the register, future lenders contract in the presumed knowledge that the creditor in the first security is exempted from strict diligence; and they may prevent anticipated loss by paying up the preferable debt, and thus rendering continued possession unnecessary. It is true that a party stipulating for, or actually charging a factor-fee, thereby subjects himself in the obligations prestable by a factor (*c*), and therefore the clause recommended in the Style-book may be detrimental to the creditor in a question with co-creditors; but the inference seems thence to be, that, in ordinary circumstances, a heritable creditor in possession is accountable for no more than his actual intromissions. (2.) This clause expresses the time and mode of redemption. (See *Redemption.*) (3.) The charges and expenses stipulated as a burden on the right of redemption, ought to include the yearly premiums of insurance against fire, when the houses on the property are valuable. The policy should be in name of the creditor (*d*).

(*a*) Jurid. Styles, 1. 290-1.
(*b*) Crs. of Kildonan, 16th June 1785, M. 14,135.
(*c*) Jack, 14th Feb. 1827, 5 S. 353; Jurid. Styles, 1. 308.
(*d*) Jurid. Styles, 1. 295, *foot note*, and clause as to insuring against fire.

TITLE IV. BOND AND DISPOSITION IN SECURITY.

213. COMPARISON WITH HERITABLE BOND.—The bond and disposition in security is a modern writ, and dates from the close of the last century. It is not mentioned by Ross. This deed differs considerably in form, but in no respect in legal effect from the heritable bond, in so far at least as regards the security of the loan. It is thus unnecessary to notice its clauses in detail. The difference in form consists in the dispositive clause conveying the lands themselves in security of the principal and interest, as contained in the personal obligation, without mention of an annualrent, the insertion of a general obligement to grant all necessary deeds in favour of the lender, in place of a procuratory of resignation and the power of sale. See form in Jurid. Styles (*a*).

(*a*) Jurid. Styles, 1. 310.

214. POWER OF SALE (*a*).—1. *Is a procuratory in rem suam?*—(1.) Although the bond and disposition has only the same feudal effect as the heritable bond, it is a preferable form of security, as containing a procuratory or mandate authorising the lender to sell the subjects for payment of his debt. But there seems to be no obstacle to the insertion of a similar clause in the heritable bond. (2.) It is true that a material distinction is drawn by the late Mr Bell (*b*) between the heritable bond and the disposition in security. He maintains that the latter confers not a right in security merely, but an absolute right of property: but the distinction does not appear to have been sanctioned by the Court, or acknowledged in practice. The conveyance of the lands in the disposition is not broader than in the bond, and is in terms a conveyance in security bearing express reference to the prior personal obligation, and both are rights under redemption. Were the notion well founded, it would follow that the debtor is completely divested by the infeftment on the first bond and disposition, and cannot grant a future conveyance to the effect of derogating, in any degree, from the power contained in the prior security;

but it is undoubted, that the debtor may competently infeft other creditors in the subject, and that the first creditor cannot convey them to a purchaser, free of the burdens imposed by future securities (*c*). It would follow, likewise, that the conveyance being absolute, the right could not be extinguished by payment or intromission, but only by resignation *ad remanentiam;* nevertheless renunciation and intromission affect equally the disposition in security and the heritable bond. (3.) The procuratory or mandate to sell is valid after the death of the debtor, and against future creditors, as being granted in favour of a party *in rem suam*, and made real by infeftment and registration (*d*).

2. *Effect in questions with the debtor.*—(1.) The effect of the power of sale was first judicially discussed in a case which occurred in the year 1790 (*e*), and it was sustained chiefly on the strength of the practice. In a question even with the debtor, a neglect of the formalities expressed in the clause of sale may give rise to vexatious questions, and ought carefully to be avoided, although, when trivial, they have, in favourable circumstances, been overlooked. Thus, a sale under the power will not be interdicted on such grounds as an irregularity in the first series of advertisements, a second series being unexceptionable (*f*), or a mistake in the Christian name of the debtor, if the identity is manifest (*g*). (2.) The Court will interfere to prevent a sale, if circumstances exist which imply an exercise of the faculty, hurtful to the interests of the debtor, without being of advantage to the creditor (*h*). (3.) Notice in a paper which contains advertisements only is a sufficient compliance with a clause requiring advertisement in a newspaper (*i*). (4.) It is thought that even in a question with the debtor, a sale by private bargain, although covenanted in the bond, would be of very doubtful validity: the only sure method of disposing of subjects to the best advantage is by open and public sale.

3. *Effect in questions with other creditors.*—(1.) In questions with creditors holding postponed securities, the power of sale has been sustained to every effect but that of enabling the creditor to give the purchaser a title clear of the postponed burdens. This defect was recognised in a question

with a purchaser who had paid over the balance of the price to the debtor, to the prejudice of a postponed creditor (*k*). (2.) Creditors in postponed securities cannot interfere with a proper exercise of the power of sale, or, by instituting a judicial sale, control the proceedings of the preferable creditor (*l*). (3.) In a question with the trustee on a sequestrated estate, it was contended that the power of sale in a first security did not exclude his interference. This plea was maintained chiefly on the terms of the clause in the Bankrupt Act (*m*), which restrains the power of real creditors in certain circumstances to bring the estate to sale; but it was held that the clause imports such real creditors only, as having no conventional powers of sale in their securities, can resort to legal proceedings only. On the general question, the Court were nearly unanimous in opinion, that a creditor may exercise a power of sale uncontrolled by other creditors, whether in postponed securities, or represented by a statutory trustee, the faculty having been invented for the express purpose of guarding against the occurrence of bankruptcy, and both as a procuratory for the creditor's own behoof, and made real by infeftment and publication in the register, being available to the exclusion of those holding postponed rights; that an objection founded on the creditor's want of title to convey the subject free of the burden of such rights, is not competent to the creditors in those rights, or to a statutory trustee; but that, as a first creditor is in some sense a trustee for all interested in the price, it is in the power of the Court to interpose *ex equitate* to prevent an abuse of the power of sale, and their interference will be justified when a clear mode of disposing of the property to more advantage can be pointed out (*n*). The burden is thus laid on the opposing party, of shewing relevant grounds for restraining a preferable creditor in the exercise of his right (*o*).

4. *Mode of exercising the power.*—The due execution of the power or faculty of sale is of much importance, as bearing on the purchaser's title and the mode of clearing incumbrances. (1.) Much caution is necessary in following out the order of sale, by giving due intimation to the debtor, and making requisition under form of instrument, and after-

wards publishing the necessary advertisements for the full period, and in the newspapers expressed in the disposition in security; (above, Art. 2.) In questions with other creditors, the formality of these proceedings will be strictly scrutinised. (2.) Doubts have been entertained if the intimation prescribed by the deed will be available to authorise a sale after the debtor's death, if his heir be under age, or even during the currency of the *annus deliberandi;* and unless it were held that a party can dispense not only with his own legal rights, but the rights of a minor heir having an interest in the reversion of the price, these doubts may be but too well founded. The sale is public; (above, § 106, *et seq.*) (3.) If the price offered be insufficient to discharge the whole incumbrances to which the property is subject, a difficulty occurs of a very serious nature, as it is a point generally assumed, that the conveyance of a preferable creditor holding a power of sale does not enable the purchaser to complete a title free of the burden of postponed securities, but protects him to the extent only of the preferable burden (*p*). It would indeed be difficult to hold that infeftment in a mere accessory right could authorise an absolute conveyance by the creditor as feudal proprietor, that right being precisely measured by the sum to which the security extends. The power of sale is good against death or bankruptcy, but it is still a mere irrevocable commission for enabling the creditor to repay himself, and no more; and as the radical fee remained in the debtor, the subsequent bondholders or other real creditors have an unquestionable right to the reversion, which can only be extinguished by payment or renunciation. If the first creditor could by public roup dispose of so much of the subject as would precisely discharge his own debt, the title of the purchaser would be undoubted; but as such nicety of procedure is impracticable, it comes to be a question of much importance by what means the purchaser may obtain a title clear of the postponed burdens. It is true, as stated in the opinions of the consulted Judges in the case of Beveridge, that the difficulty can only arise where the creditors in these securities act against their own interest by refusing to concur in the sale; but circumstances may easily be supposed in which mere ca-

price will prevent their discharging their debts or joining in the conveyance, and the register thus remains incumbered with the real burdens. (4.) Purchase at a voluntary sale by an individual creditor is thus less secure than at sales for the behoof of a body of creditors under statutory authority. Under a judicial sale the lands are disburdened of the debts of the bankrupt and his predecessors from whom he acquired right (*q*), upon payment or consignation of the price by the purchaser; and under a sale by a statutory trustee, the burdens are restricted to the amount of the price (*r*).

5. *Mode of giving a clear title.*—(1.) The dangers to which the purchaser is subject seem, however, to be somewhat magnified by Mr Bell (*s*), for it is not to be supposed that a purchaser at a fair sale would run any risk from the real diligence of postponed creditors, were he to consign the balance of the price in the hands of the Court, and call these parties in a multiplepoinding (*t*). The real difficulty consists in clearing the register; and although it is probable that, in an action of that description, the Court might, in the ordinary case, competently declare the postponed securities to be extinguished on consignation by the purchaser, it has been doubted if such a decree would be effectual against minors or others whose legal *status* is defective. (2.) The ingenious mode suggested by that learned author, of giving a good title to a purchaser by means of a trust, does not appear to have been attempted in practice, although well deserving of consideration (*u*). The trust behoved, however, to be extended, so as to embrace all the real burdens imposed on the subject prior to the sale; and as it is no longer doubtful that the radical fee remains in the truster (*v*), the real creditors would probably be held preferable, notwithstanding the existence of a trust, in the order of their infeftments. To provide against the contingency of the first creditor's debt being discharged, the bondholders, in their order, would be constituted trustees for the behoof of all interested in the price. But it is manifest that the obstacles to such a form of security are many and great; and even were it adopted, and found effectual to enable the first creditor for the time being to give a secure title to a purchaser, still the postponed creditors could act only with

consent of the first creditor, unless judicially, by availing themselves of the intricate and expensive form of the ranking and sale.

6. *Remedy by judicial proceedings.*—The effectual mode of enabling the first, or any other creditor, to bring the subject to sale, and give a clear title to a purchaser, seems therefore to be, by combination of the voluntary procedure sanctioned by the bond and disposition in security, with a judicial process for dividing the price among the whole parties interested. Care, however, must be taken, on the one hand, to avoid too much interference with the rights of the creditor who has lent his money on the faith of an unincumbered subject, over which he has acquired a title from the proprietor to exercise a large measure of control, and, on the other, of so depressing the interests of future creditors, as to make it difficult for a proprietor to obtain loans upon postponed security. In authorising a postponed bondholder, having a faculty in his bond, to bring the subject to sale, provision ought therefore to be made that a sale shall not be conclusive as against the prior creditors, unless the price obtained is equal to the amount of their debts. Under such a provision, the price being properly invested for behoof of those having an interest in it, a power given to postponed creditors to expose the subject to sale without having recourse to judicial authority in the first instance, would perhaps prove a salutary change on the present system, whose practical operation is to render the voluntary sale of a subject burdened to more than its value nearly impossible. Where the creditors should refuse to concur in a discharge and conveyance to the purchaser, the price might be consigned, and the estate disburdened, by authority of the Court, under proper provisions in regard to the citation of minors and others legally disqualified from giving consent (*w*).

(*a*) DECLARING also as it is hereby expressly PROVIDED and DECLARED that if I or my foresaids shall fail to make payment of the sums that shall be due by the personal obligation before written within *(the usual period is six)* months after a demand of payment is intimated to me or my foresaids personally or at our dwelling-place if within Scotland or if furth thereof at the market-cross of Edinburgh by a notary-public and witnesses then and in that case it shall be lawful to and in the power of the said B. or of his foresaids immediately after the expiration of the said six months and without any other intimation or process

of law for that effect to sell and dispose in whole or in lots of the foresaid lands and others before disponed by public roup on previous advertisement weekly for at least *(the usual period is two)* months subsequent to the expiry of the said six months in any two of the Edinburgh newspapers *(usually named)* they being always bound upon payment of the price to be given therefor to hold count and reckoning with me and my foresaids for the same after deduction of the foresaid principal sum whole interest thereof liquidate penalties and termly failures that shall be due under the said obligation and all other expenses to be laid out by them as aforesaid or in the sale of the said lands and others and for that end to enter into articles of roup grant dispositions containing procuratory of resignation assignation to the writs and evidents and to the rents maills and duties precept of sasine and a clause binding me and my heirs in absolute warrandice of such dispositions and obliging me and them to corroborate and confirm the same and to grant all other deeds and securities requisite and necessary by the laws of Scotland for rendering the said sale or sales effectual in the same manner and as amply in every respect as I could do myself Declaring that the purchaser or purchasers shall be nowise concerned with the application of the price or any of the conditions herein mentioned but that the sale or sales shall be equally good to him or them as if made by me or my foresaids AND also declaring that in carrying the said sale or sales into effect it shall be lawful to the said B. or his foresaids to prorogate and adjourn the day of sale from time to time as they shall think proper notice being always given of such adjournments in the said newspapers as above mentioned once weekly for at least *(the usual period is three)* weeks And I BIND and OBLIGE me and my foresaids to RATIFY APPROVE of and CONFIRM any sale or sales that shall be made in consequence hereof and to grant absolute and irredeemable dispositions of the foresaid lands and others before mentioned or such parts thereof as shall be sold to the purchaser or purchasers their heirs and assignees and to execute and deliver all other deeds and writings that shall be necessary for rendering their rights complete.

(*b*) Bell's Conv. 3d edit p. 89, 90.

(*c*) Beveridge, 17th Jan. 1829, F. C., 7 S. 279.

(*d*) Beveridge, as above.

(*e*) Brown, 11th July 1790, M. 14,125.

(*f*) Glas, 29th May 1830, 8 S. 843.

(*g*) Dickson, 15th Jan. 1831, 9 S. 282.

(*h*) Beveridge, as above.

(*i*) Dickson, as above.

(*k*) Steven, &c. 19th Feb. 1811, F. C.; Bell's Com. 2. 291-5.

(*l*) Marshalls, 19th Jan. 1821, F. C.; Simson, 25th Nov. 1831, F. C.; 10 S. 66; Hutchinson, 14th Feb. 1833, 11 S. 395; Robertson, 12th Dec. 1833, 12 S. 203.

(*m*) 54 Geo. III. c. 137, § 42.

(*n*) Beveridge, as above.

(*o*) See Ker, 3d March 1830, 8 S. 628.

(*p*) See Bell's Com. as above.

(*q*) 1695, c. 6.

(*r*) 54 Geo. III. c. 137, § 42.

(*s*) Bell's Com. 2. 294.

(*t*) See Marshalls, as above.

(*u*) Bell's Com. 2. 294-5.

(*v*) M'Millan, 4th March 1831, F. C., 9 S. 551.

(*w*) A bill has been before Parliament relating to the subject of this section.

TITLE V. BOND OF REDEEMABLE ANNUITY.

215. FORM AND EFFECT.—This security is of modern introduction, and employed to constitute burdens over entailed subjects limited to the granter's lifetime. It is in substance an annualrent right defeasible by the death of the debtor. (1.) By the *obligatory clause*, the granter, in consideration of a certain sum of purchase money, binds himself, his heirs and successors, to make payment of a *free yearly annuity or annualrent charge* of a specified amount, and that at two terms, &c. (2.) By the *dispositive clause* the lands are conveyed in real security, as in the bond and disposition; but of the annuity merely, and that during the natural life of the granter, or so long as it shall be unredeemed by him; under an express declaration, that no adjudication or other diligence to follow upon the obligation shall affect the estate or the right of future heirs, and the security shall, on the death of the granter, become *ipso facto* void and null. (3.) The other clauses follow the style of the bond and disposition, qualified by reference to the above declaration (*a*). (4.) This form of security has stood the test of judicial discussion, and been held effectual in competition with a tenant of the lands who claimed retention of rents on the strength of a prior personal bond in his favour (*b*).

(*a*) Jurid. Styles, 1. 337.

(*b*) Nairne, 15th Feb. 1810, F. C. The clause was in these terms: "But "declaring always as it is hereby provided and declared that the foresaid annuity shall not be understood in any respect whatever to affect the lands and "others foresaid or the rents thereof for any longer period than my lifetime or "the not redemption of the said annuity; nor shall these presents be the ground "of any apprising or adjudication or of any other legal diligence whereby the "lands and others foresaid may be in any manner of way affected or evicted "from the heirs of entail entitled to succeed to me therein in virtue of the deed "of entail thereof &c. and further that my granting these presents shall in no "wise be interpreted or extended to infer any infringement upon or the incurring of any of the irritancies contained in the said deed of entail or any derogation therefrom in any manner of way whatever the said annuity being only

" meant and intended to affect the said lands and others to the extent foresaid " during my liferent right thereto and no otherwise."

TITLE VI. SECURITIES FOR FUTURE DEBTS.

216. BONDS OF CREDIT AND RELIEF (*a*).—1. *Effect of statute* 1696 (*b*).—This statute declares, that any disposition or other "rights that shall be granted for hereafter, for relief or " security of debts *to be contracted for the future*, shall be of " no force as to any such debts that shall be found to be con- " tracted after the sasine or infeftment following on the said " disposition or right." These words, *after the sasine*, are to be read, *after the due registration of the sasine* (*c*). This enactment proceeded on the preamble, that securities " in " relief not only of debts already contracted, but to be con- " tracted for thereafter, are often found to be the occasion or " covert of frauds;" but as the terms admit of no exception, the statute was held to be applicable to cases where the interests of commerce called for a different rule; and securities to bankers for cash-credits, and to cautioners in such obligations for their relief, were thus struck at, except as regarded sums advanced prior to the infeftment (*d*).

2. *Cash-credits legalised.*—Securities to bankers for cash-accounts are truly not indefinite, or for future debts, in any other sense than is the obligation for the penalty in a liquid obligation, when the amount which the advances are limited to and cannot exceed is specified in the bond. They were accordingly taken out of the scope of the Scottish statute (*e*), and heritable securities may now validly be given for cash-accounts with bankers, and in relief to cautioners in such accounts, provided the principal sum and interest under the bond shall be limited to a definite sum, " the said definite " sum not exceeding the amount of the principal, and three " years' interest thereon, at the rate of five *per centum*;" but the specification of the principal sum, with the addition of the words, *three years' interest at the legal rate*, is held to be sufficient compliance with the proviso of the Act (*f*).

(*a*) Jurid. Styles, 1. p. 315, *et seq.*
(*b*) 1696, c. 5; above, p. 269.

(c) Dunbar's Creditors, 30th July 1789, M. 1156.

(d) Creditors of Stein, 14th Nov. 1789, M. 1158; Hailes, 1071; affirmed on ap.; Brough's Creditors, 2d March 1791, M. 1159.

(e) 33 Geo. III. c. 74, § 12; 57 Geo. III. c. 137. See Bell's Com. 1. 673, and 2. 236.

(f) Morton, 10th Dec. 1828, 7 S. 172; affirmed, 4 W. S. 379.

217. ABSOLUTE DISPOSITION WITH BACK-BOND.—(1.) A security for future as well as past advances may be constituted by means of an absolute irredeemable disposition in favour of the creditor, from which all mention of the nature of the transaction must be excluded. The purpose of the conveyance is expressed in a back-bond (*a*), which is of the nature of a right of reversion, and therefore, to be effectual against the singular successors of the disponee, must be recorded in the register of sasines and reversions (*b*). (2.) The disposition being in form absolute, the qualification of the right can be proved only by the writ or oath of the disponee (*c*). (3.) The conveyance, as being absolute, necessarily excludes the debtor from all power to borrow money so as to burden the subject, unless from the disponee; and as the right of reversion is a mere personal claim, which cannot be broader to his creditors than to the disponer himself, the disponee is not bound to redispone unless upon payment of all his advances, whether made before or after infeftment (*d*). (4.) Even although the right of reversion in the back-bond should be burdened with a specified sum only, or refer to a specific transaction, the debtor, and consequently his creditors, cannot demand a reconveyance but on payment of the whole sums due to the disponee (*e*). But as a qualification inserted in the conveyance itself would necessarily restrict the right to a mere security, and limit its effect to the specific transaction referred to, the same result would probably follow from the registration of the back-bond, or the judicial demand of a reconveyance, and the right be thereby restricted to a security for the advances expressed in the back-bond (*f*); or where it is conceived in general terms, to the sums actually advanced and due at the time. (5.) This form of security is not usual in practice, and is only adapted to peculiar circumstances.

(*a*) Bell's Forms, 2. 291.

(*b*) See Keith, 8th July 1795, M, 1163.

(*c*) 1696, c. 25, above, p. 4. See Taylor, 14th Nov. 1833, 12 S. 39; Macfarlane, 23d May 1837, 15 D. 978.

(*d*) Riddel, 16th Feb. 1782, M. 1154; Brough's Creditors, 26th Nov. 1793, M. 2585. See Wood, 15th Nov. 1836, 15 D. 12.

(*e*) Maitland, 23d Nov. 1827, 6 S. 109; Russell, 18th June 1829, F. C., 7 S. 767; affirmed, 4th April 1831, 5 W. S. See Tierney, 16th June 1832, 10 S. 664.

(*f*) Bell's Com. 1. 684. See Keith, as above.

TITLE VII. BURDENS BY RESERVATION.

218. GROUND-ANNUALS, &c.—Reserved burdens, properly so called, are constituted by clauses in other deeds, and are therefore, according to the system followed in these notes, considered under the titles of these deeds. (See § 137, and also *Special Settlement.)*

TITLE VIII. SASINE ON CONVEYANCES IN SECURITY (*a*).

219. FORM AND EFFECT.—In a feudal sense there is nothing peculiar in the instruments of sasine following upon heritable bonds, or bonds and dispositions in security. The symbols of infeftment in the former are earth and stone for the lands, and a penny money for the annualrent, and in the latter earth and stone only. (1.) Sasine is essential to the constitution of the security and the right of redemption; and therefore the respective rights of the parties are expressed in the dispositive clause and precept of sasine, in order that they may be transferred to the instrument of sasine and the register. (2.) Sasine proceeds, in correct practice, upon the precept in the bond and after the infeftment of the debtor; but it is deemed competent, by high authority (*b*), to assign the unexecuted precept in an absolute disposition to the effect of authorising infeftment in security. Where, therefore, a borrower holds a personal right, *e.g.* a disposition not feudalised, the proper course is to grant a bond or bond and disposition in the usual form, and to give infeftment both to the borrower, on the precept in the disposition, and to the lender, on

the precept in his bond, at one and the same time, the instruments of sasine being registered in their proper order. This is the safe rule of practice, although, as above explained, the subsequent infeftment of the borrower would validate the security of the lender; (§ 205.) Farther steps are unnecessary for the safety of the lender, provided that both the disposition and the bond contain an alternative holding; but if the holding in either should happen to be public, *a me*, confirmation is essential for his security; (above, § 149.) (3.) Heritable securities are preferable according to the dates of the registration of the sasines; and when two or more securities are completed of the same date with a view to a *pari passu* effect, a declaration to that purpose is introduced in the precept of sasine of each of the bonds, and thence transferred to the sasine and the register. In the absence of such a declaration, the sasine first entered in the register, although presented at the same instant of time with another, will give an absolute and not merely a *pari passu* preference (*c*). Where it is intended to give a preference to a security postponed in date, the prior creditor joins as a consenter in the bond (*d*).

(*a*) See Jurid. Styles, 1. 346.

(*b*) Bell's Princ. 877; More's Notes on Stair, clix.

(*c*) Douglas, 21st Feb. 1835, F. C., 13 S. 505. See note to Lord Moncreiff's interlocutor. See above, § 80.

(*d*) Jurid. Styles. 1. 309.

TITLE IX. ADJUDICATIONS.

220. MEANING OF THE TERM.—(1.) Adjudication, in the feudal sense of the word, is a judicial conveyance of heritage in security of claims of debt, subject to a power of redemption in the debtor, which cannot be foreclosed until the expiry of a certain period fixed by law, and endures after that period until a decree of the Supreme Court, called a decree of *declarator of the expiry of the legal*, has been obtained, declaring the right irredeemable, or the positive prescription has made it absolute. Adjudication, when perfected by decree and feudalised by infeftment, may therefore be classed amongst rights in security. (2.) Adjudication, although thus an assignation, needs

no intimation; and as it carries personal rights as effectually as a voluntary conveyance, an adjudger of lands held under a disposition not feudalised may, by obtaining the first completed infeftment, exclude a prior voluntary disponee (*a*).

(*a*) Bruce, 3d Feb. 1619, M. 207; Bell, 22d June 1737, M. 2848; Mitchell, 13th Feb. 1781, M. 10,296.

221. How CONSTITUTED.—1. *Terms and effect.*—This kind of security or diligence was substituted by statute (*a*), in place of the old form of apprising, which was a judicial sale of the debtor's heritage, subject to a power of redemption (*b*). In a feudal sense, the effect of the adjudication is to burden the lands belonging to the debtor embraced by the action with the principal sum and interest, and also the liquidate penalty which is accessory to these sums, if the debt be constituted by bond, and in all cases with the composition payable to the superior for an entry, and the expense of the infeftment passing upon or in virtue of the decree (*c*). It carries a right, likewise, to all charters, dispositions and other title-deeds of the subjects. This sort of adjudication is called a *general adjudication*, as embracing all the lands in the summons. A *special adjudication*, on the other hand, is a judicial transference, introduced by the same statute, of a part of the lands equivalent to the debt. Although the summons of adjudication gives the debtor this latter alternative, it is never embraced in practice (*d*). (2.) Adjudication of lands embraces their pertinents, and thus mines are carried without being specified, but not teinds, which are a separate subject (*e*). (3.) Under the words, *all other right, title and interest*, &c. usually introduced after the description of the lands in the summons, are comprehended all lesser rights of property, should the debtor's right not extend to the fee; but adjudication does not affect subjects not the actual property of the debtor at the date of the diligence, although subsequently acquired by him (*f*). The decree concludes with a warrant for a charge against the debtor's superiors to enter and infeft the creditor in the lands adjudged.

2. *Registration.*—An extract of the decree of adjudication answers, for the purpose of infeftment, either to a transference by voluntary assignation of a personal right to lands,

or to resignation *in favorem* by a party having a feudal right, according to the state of the debtor's title. Along with the extract, an abbreviate of it is prepared, containing the names of the creditor-adjudger and debtor, the description of the lands and the particulars of the debt, which is registered within sixty days after the date of the decree in the *Register of Abbreviates of Adjudications* (*g*). This abbreviate was, by Act of Sederunt, appointed to be made out in duplicate, and subscribed by the Judge of the Court of Session who pronounced the decree, one copy to remain with the keeper of the register as a warrant for future extracts. These duplicates are now subscribed by an Extractor of Court in place of the Judge (*h*).

(*a*) 1672, c. 19.
(*b*) Ersk. 2. 12. 1. 38.
(*c*) 1672, c. 19; A. S. 26th Feb. 1684.
(*d*) Ersk. 2. 12. 39, and foll.
(*e*) Auchterlony, 28th Nov. 1755, M. 164; Home, 17th Feb. 1702, M. 184.
(*f*) Fairholm, 21st Nov. 1673, M. 182; Nisbet, 23d Jan. 1674, M. 183; Wilson, 8th July 1836, 14 D. 1117.
(*g*) Regulat. 1695, Art. 24.
(*h*) 1 and 2 Geo. IV. c. 38, § 18.

222. HOW FEUDALISED.—1. *Effect of the decree.*—The right carried by the judicial conveyance of adjudication is precisely the right which exists in the person of the debtor, subject to redemption. Adjudication does not perfect the debtor's titles, but transmits them as they stand to the creditor (*a*). It follows, therefore, that the creditor-adjudger must complete a title, as if he stood in the shoes of the debtor. Thus, let it be supposed that an adjudger from a debtor, whose title is a disposition with its feudal clauses unexecuted, obtains from the superior a charter of adjudication containing a mere warrant for infeftment, and not proceeding upon the procuratory of resignation in the disposition, on which charter he obtains infeftment. The title thus made up does not fulfil the feudal rules. In competition, therefore, with a voluntary disponee of the debtor, holding a conveyance prior in date to the adjudication, on which a title has not been completed until after the infeftment of the adjudger, the former will be pre-

ferred to the subject (*b*). A disponee in a conveyance subsequent in date to the decree, not affected by the plea of litigiosity, might in like manner complete a title to the exclusion of the adjudger. (See § 128. 1.)

2. *Mode of completing title.*—(1.) As the particular manner in which the adjudger's title must be completed depends upon the title of the debtor, it is the duty of the conveyancer, before taking out a charter of adjudication upon the decree, to ascertain how the latter stands. The register will shew the terms of the debtor's sasine, when he is infeft. When, again, his right is personal, it seems competent to the adjudger either to bring an action of exhibition against the custodier of the title-deeds, or of adjudication in implement of the decree of adjudication, against the vassal last infeft or his heir (*c*). (2.) The adjudication first completed by infeftment operates for behoof of all those creditors who have become co-adjudgers before the date of the decree, or after, but within year and day of the same, although not to exclude intervening voluntary infeftments, which are preferable to the diligence of future adjudgers (*d*). In questions, therefore, between adjudgers and voluntary disponees or creditors whose rights are not affected by litigiosity, the title of each and every adjudger must, to be effectual, be duly feudalised; but among the adjudgers themselves the proceedings authorised by statute are equivalent to infeftment (*e*).

3. *Particular examples.*—(1.) If the debtor is infeft on a disposition, containing an alternative holding or a holding *a me*, the adjudger will enter by charter of confirmation and adjudication. (2.) If, again, the debtor is entered with his superior, the adjudger will expede a charter of adjudication simply. (3.) A personal right in the debtor being transferred to the adjudger, he will proceed according to the ordinary rules, by taking infeftment on the precept in virtue of the judicial assignation, or obtaining at once a charter of adjudication and resignation. It is unnecessary to multiply examples, as cases are readily resolved by keeping in view the simple rules, that the decree of adjudication transfers personal rights to the adjudger; in the case where the debtor is entered, operates as a resignation *in favorem*, accepted by

the superior; and where he is infeft on an indefinite precept, but not entered, puts the adjudger in a situation to obtain a charter combining the forms of confirmation and adjudication. The only distinction consists in the style of the charters.

4. *Where the adjudger is superior.*—In this case it was anciently held that the decree of adjudication effected the consolidation of the property and superiority (*f*); but as consolidation does not operate *ipso jure*, the superior must complete his title as an adjudger, either by granting a charter in his own favour, or executing open precepts or procuratories, and resigning in his own hands *ad remanentiam* (*g*).

5. *Cases of erroneous entry.*—It may be proper to illustrate shortly the consequences that would follow from obtaining immediate warrant for infeftment from the superior, without regard to the state of the debtor's title. (1.) Let it be supposed that the debtor has granted a conveyance of his property in order to defeat the diligence of adjudication, and that such conveyance cannot be cut down by extrinsic objections. If the debtor's right is personal, and the adjudger can first obtain possession of the deed on which it stands, he may, by completing a title in either of the forms explained in Art. 3, exclude the disponee; but if the adjudger should expede a charter of adjudication simply, the disponee may, in course of time, acquire a preferable title (*h*.) (2.) Put the case that the debtor stands infeft on the indefinite precept in the disposition of sale, and that the adjudger obtains from the superior a charter of adjudication simply, without combining with it confirmation of the debtor's sasine: Infeftment on the charter will vest nothing in the adjudger, since the debtor was not entered; and a voluntary disponee of the debtor, against whom litigiosity is not pleadable, may exclude the adjudger, by expeding a charter of resignation on the procuratory in the disposition by the debtor's author, taking infeftment thereon, and also on the disposition by the debtor, confirming the latter of these infeftments, and resigning in his own hands *ad remanentiam* (*i*).

(*a*) See 1693, c. 35, above p. 100.

(*b*) Marshall and Ruthven, 1st March 1782, M. 6927. See Ersk. 2. 12. 29; Ballenden, 6th June 1822, S., affirmed, W. S. 1. 381.

(*c*) Marshall and Ruthven, as above.

(*d*) 1661, c. 62; Ersk. 2. 12. 31, 32; Chalmers, 8th Nov. 1737, Elch. *Compet.* 4, and *Adjud.* 14.

(*e*) 1661, c. 62; 1672, c. 19. See Ersk. 2. 12. 31-41.

(*f*) Stair, 3. 2. 23.

(*g*) Ersk. 2. 12. 29.

(*h*) See Marshall and Ruthven, as above.

(*i*) See Dick, 15th June 1748, M. 1724.

223. WHERE THE LANDS ARE IN NON-ENTRY.—1. *Entry by charge.*—The debtor against whom adjudication is sought may have right to the lands as an heir unentered, or the debt may have been owing by a party deceased, to whom the heir has not made up a title. He must be the proper heir-at-law, or of the investiture, the heir of provision being the proper party where the object is to adjudge the subject of the conveyance; but it has been questioned, if a fiduciary fiar who is the heir-at-law, and holds the property under a conveyance to himself *in liferent allenarly, and to the heirs of his body in fee*, can be proceeded against except under the character of heir (*a*). The feudal effect of the forms prescribed in that situation of the title depends upon the provisions of two statutes (*b*). These do not, however, express the distinction introduced in practice, in respect of the steps to be followed, between the case where the debt is the heir's, and that where it was the ancestor's. The statute of 1540 prescribes in general terms a charge against the heir, upon forty days, to enter to the lands, and on his disobedience, authorises letters of apprising, (now superseded by adjudication,) which shall have as great strength, force and effect *as if the heir were entered, and the lands holden of the immediate superior thereof.* A charge under the statute is thus equivalent not merely to special service, but to the complete renewal of the feudal investiture in the person of the heir. This effect is limited, however, to the creditor and his co-adjudgers, and does not extend to validate by accretion a voluntary conveyance and infeftment flowing from the heir (*c*). The statute of 1621 extends the provisions of the former to the case where the heir is himself the debtor.

2. *Where the ancestor was the debtor.*—(1.) In order to fix the constructive representation introduced by the statute, in the apparent heir, it has for a long period been the

practice to pass under the signet letters of *general charge* (*d*), whereby the heir is commanded, upon a charge of forty days, to enter himself heir to the deceased, to the effect that the creditor may have such action and diligence against him as he would have against the ancestor were he still alive. Whether this command be obeyed or disregarded, (unless the succession be expressly renounced, see § 224,) the creditor has got a defender, against whom he may proceed to constitute his debt. (2.) As soon as he has obtained decree of constitution, he may give the charge mentioned in the statute, and upon twenty days only (*e*). The form of this second writ varies in practice. If the ancestor died vested and seised as of fee, it takes the form of a *special charge* against the heir to obtain himself entered and infefted in the lands, and the certification or penalty threatened in case of disobedience is, that the creditor shall have "such process, action and execution of adjudication, and other diligence of the law competent, directed, led, used and executed against the debtor, as lawfully charged to enter heir in special, as aforesaid, to the said deceased, in manner above specified, notwithstanding he wilfully lies forth and will not enter," &c. (*f*). (3.) But if the right in the ancestor was personal, the charge is styled a *general special charge*, of which the certification is similar, but contains the terms, heir in general, in place of heir in special. The effect of both is the same. By force of the statute, the heir is placed in the shoes of the ancestor, and adjudication will proceed in the ordinary form.

3. *Where the debt is the heir's.*—(1.) If, on the other hand, the heir is himself the debtor, his liability being direct and undoubted, a general charge, for the purpose of producing a constructive representation, is unnecessary. The creditor directs against him a special or general special charge, according to the state of the title, and proceeds to adjudge as above. This charge, as being the first, is on forty days (*g*). (2.) Where it happens that the ancestor held part of the subjects on a feudal, and another part on a personal title, the two forms of charge will in this, as well as in the case supposed in Art. 2, be combined, and the writ is then styled a *special and general special charge*.

4. *How feudalised.*—An adjudger from an heir charged in terms of the statute, is entered by charter of adjudication, the heir's title being constructively completed by the charge; but where the ancestor's right was personal only, the title will be completed as in § 222, Art. 3. (See *Entry of Heirs; Trust-Adjudication.*)

(*a*) E. Selkirk, 3d March 1756, M. App. *v. Adjudication*, No. 1. See Waddell, 9th July 1833, F. C., S.

(*b*) 1540, c. 106. AND anent the remeid to be put to the fraude daily committed be heretoures of them that ar dead and ar awand great summes of money to sindrie persounes their creditoures and the saidis aires fraudfulliely lyis furth and will not enter to their landes swa that they may be distreinzied for the saidis debtes in case they be not distreinziable in uthers moveable gudes Therefore it is STATUTE and ORDAINED that letters shall be direct be deliverance of the Lordes of Councel and at the instance of ony complainer to command and charge the saidis heretoures they being of perfite age to enter to their landes yeir and daye being past after the decease of their father or predecessoures quhom to they succeede to enter to the samin within fourtie daies nixt after their charge And failzieing thereof letters sall be direct to the Schireffe of the schire and his deputes to apprise the saidis landes to the saidis creditoures for the saidis debtes gif they be liquide The quhilk processe of apprising sall have als great strength force and effect as the saidis aires were entered thereto and the saidis apprised landes to be halden of the immediate superiour thereof PROVIDING always that it sall be leasum to the saidis heretoures and their successoures to redeem the saidis landes within seven yeires conform to the Act of Parliament maid thereupon of before and after the tenour thereof in all punctis.

(*c*) 1621, c. 27. See Peacock, 22d June 1826, F. C., S., where this form employed to cut down a bond granted by the heir.

(*d*) Ersk. 2. 12. 12-13; Jurid. Styles, 3. 373-5.

(*e*) 54 Geo. III. c. 137.

(*f*) Jurid. Styles, as above.

(*g*) 54 Geo. III. c. 137.

224. ADJUDICATION CONTRA HÆREDITATEM JACENTEM.—1. *Forms.*—An heir charged in general to take up his ancestor's succession may come forward and renounce to be heir, which is done judicially in the process of constitution. In this situation, as it would be incongruous to charge him in special to enter to lands the succession to which he has abandoned, a decree is taken against him in that process, called *cognitionis causa tantum*, for the purpose merely of liquidating the claim. In the same action, (the summons containing an alternative conclusion to that effect,) decree of adjudication may be obtained *contra hæreditatem jacentem et bona mobilia et im-*

mobilia,—the heritage and heirship moveables thus lying unclaimed by the heir of the deceased (*a*). Adjudication of this sort arose out of the necessity of the case. It was afterwards recognised and regulated by statute (*b*).

2. *How feudalised.*—Where the heir has renounced the succession, and has therefore not been charged in special or in general special, there is consequently no statutory representation, and the title remains as it stood in the ancestor's person. The adjudger will therefore enter as if the decree were against the ancestor in place of the heir. (See § 222, Art. 3.)

(*a*) Jurid. Styles, 3. 367-9.
(*b*) 1621, c. 7.

225. ADJUDICATION IN IMPLEMENT.—1. *Forms.*—(1.) There is another kind of adjudication, which, although not a redeemable right, may in a few words be noticed here, as analogous in form to the adjudication for debt. It is the adjudication in implement, which is the mode of obtaining judicial authority for completing a feudal title in the person of a disponee, when the deed of conveyance contains neither procuratory of resignation nor precept of sasine. It proceeds upon the obligation, either express or implied, of the granter to infeft the grantee, and follows the forms explained in § 222-224, according as the obligation is that of a party alive or deceased, and as the title is or is not complete. Adjudication in implement has precisely the effect and no more of a deed voluntarily granted in implement of an imperfect conveyance (*a*). (2.) In mercantile sequestrations under the Bankrupt Act, the Court, upon a petition presented by the trustee, adjudge summarily all lands and other heritable estate belonging to the bankrupt to belong to the trustee, absolutely and irredeemably; and it is provided, that this adjudication "being of the nature of an adjudication in implement, as well as for payment or security of debt, shall be subject to no legal reversion" (*b*). But the right thus acquired by the trustee is personal only, and not feudal, so that thereby the rights of onerous purchasers or bondholders are not affected, provided they are completed by registered sasines before the trustee's right is feudalised.

2. *Title.*—The title of the adjudger is completed in the same manner as under a decree of adjudication for debt; (see § 222-224.) The right thereby acquired is absolute and irredeemable, the purpose of the judicial process being to obtain the authority of the Court to feudalise the conveyance as wanting the warrant of the granter. It is more especially to be observed, with reference to the rights of creditors, that great caution ought to be used by a trustee in completing a title to the bankrupt's heritage, so as to leave the bankrupt out of the progress, and thus avoid validating securities over it which have proceeded *a non habente*. When the right of the bankrupt rests on apparency, the trustee ought to proceed under the constructive adjudication depending on statute, and not by infeftment on a conveyance from the bankrupt, since the bankrupt's precept could only be validated by his own subsequent service and infeftment, steps which would accresce to the prior securities. Where, again, the right of the ancestor was personal, a conveyance may be taken from the bankrupt with safety, provided the unexecuted precept be used not for his own but the trustee's infeftment, as the service of the bankrupt will not benefit the prior bondholders, unless followed up by infeftment in his own person; (above, § 138. 3.)

(*a*) Paton, 21st Feb. 1835, 13 S. 509.
(*b*) 54 Geo. III. c. 137, § 29.

TITLE X. TRANSMISSION OF REDEEMABLE RIGHTS.

226. CONCURRENCE OF DEBTOR.—Heritable securities and other redeemable rights (with the exception, perhaps, of burdens by reservation,) (§ 136. 4.) are transmitted by disposition and assignation. A conveyance to a second disponee receives the title of *Translation*, and a return conveyance to a party formerly in right of the security, that of *Retrocession*. When a loan secured by heritable bond, or bond and disposition in security perfected by registered sasine, is called up, and it is not convenient for the debtor to discharge it, the course of practice is to procure the money upon a transference of the right. It is understood in practice that the cre-

ditor is bound to grant such a conveyance when required; but, in the Style-book, a clause is recommended for adoption in order to exclude the objection (*a*). In a transaction of this description, as the creditor-disponer's warrandice is only from his own fact and deed, and personal, it is of importance to obtain the concurrence of the debtor, in order to exclude the plea on his part of a total or partial extinction of the burden by payment or intromission. (See *Discharge and Renunciation.*) But as a plea of this nature would be competent likewise to a postponed creditor, the concurrence of the debtor does not supersede the propriety of making due inquiry into the nature and circumstances of the transaction. Redeemable rights are transmissible either before or after infeftment.

(*a*) Jurid. Styles, 1. 309.

TITLE XI. DISPOSITION AND ASSIGNATION OF AN HERITABLE BOND (*a*).

227. NARRATIVE.—The introductory clause or narrative of the deed of conveyance of the heritable bond, which will serve as a type of the class of voluntary securities, recites the cause of granting, and narrates the principal deed. It is necessary here to identify the bond by date and sums, and to state correctly the amount of the consideration. This will consist of the sum secured, or such lesser sum as may be agreed on by the parties.

(*a*) Jurid. Styles, 1. 359-60.

228. DISPOSITIVE (*a*).—In this clause the granter dispones both the annualrent and the lands themselves. Here it is essential to employ proper dispositive words, and correctly to specify the annualrent and describe the lands.

(*a*) Therefore I have sold and disponed as I do hereby SELL ALIENATE and DISPONE from me my heirs and successors whomsoever to the said C. his heirs and assignees heritably but under reversion in manner specified in said heritable bond NOT ONLY ALL and WHOLE the foresaid annualrent of £. or such an annualrent as shall correspond by law to the foresaid principal sum of £. yearly to be uplifted as aforesaid furth of all and whole the lands of

and others after described or furth of any part or portion thereof readiest rents maills and duties of the same BUT ALSO ALL and WHOLE the said lands of *(describe them)* themselves in security of the foresaid principal sum interest from the liquidated expenses and termly penalties if incurred.

229. CLAUSE OF ASSIGNATION (*a*), &c.—Besides conveying the lands and annualrent, the granter assigns the principal sum, interest and penalties, with power to recover payment by action or diligence, and (as infeftment has not followed upon it) likewise the bond itself and its unexecuted feudal clauses, but under redemption as expressed in the bond. The remaining clauses are a *clause of warrandice from fact and deed, clause of delivery of writs, clause of registration*, and the *testing clause*.

(*a*) AND FURTHER I do hereby MAKE AND CONSTITUTE the said C. and his foresaids my lawful assignees in and to the foresaid principal sum of £. penalty before specified annualrents of the said principal sum since and in time coming during the not payment and termly failures stipulated therefor all before specified AND in and to the said heritable bond itself procuratory of resignation precept of sasine and whole other clauses therein contained surrogating and substituting the said C. in my full right and place of the premises during the not redemption REDEEMABLE always the said annualrent and lands themselves in terms of the clause of reversion contained in said heritable bond WITH POWER to the said C. to procure himself infeft and seised in the foresaid annualrent and lands and others themselves in security as aforesaid by virtue of the procuratory of resignation or precept of sasine contained in said bond both yet unexecuted and of this assignation thereto AND ALSO with power to him and them to intromit with and uplift and if necessary to sue for payment of the sums above assigned to grant acquittances renunciations or conveyances thereof which shall be sufficient to the receivers and generally every other thing in the premises to do which I could do myself before granting hereof.

TITLE XII. DISPOSITION AND ASSIGNATION OF HERITABLE BOND AND SASINE.

230. FORM AND EFFECT.—(1.) The conveyance of the feudalised security (*a*) necessarily differs in a considerable degree from the form noticed in § 227-9. The clauses are the same to the end of the dispositive clause, after which are introduced an *obligation to infeft* and a *procuratory of resignation*, as in the heritable bond. These the disponee is enabled validly to grant, as being himself infeft. Next in order is the

clause of *assignation* to the debt and bond, as in the last example, with the addition of the sasine, and omitting the feudal clauses of the bond. Then follow the *clauses of warrandice, of delivery and of registration, the precept of sasine and testing clause*. In the precept of sasine the clause of redemption may be expressed or referred to as in the bond. (2.) Infeftment on the assignation is not essential for enabling the assignee to recover payment from the debtor, or even to use the feudal diligence of poinding the ground (*b*). The right of the assignee ought, however, to be feudally completed without any delay, in order to exclude future assignees or the adjudging creditors of the cedent. (3.) A postponed creditor of the fiar cannot object to the formality of the assignee's titles (*c*).

(*a*) Jurid. Styles, 1. 354-6.
(*b*) Tweedie, 22d Jan. 1836, 14 D. 337.
(*c*) Procter, 29th June 1837, 15 D. 1219.

TITLE XIII. DISPOSITION AND ASSIGNATION OF ADJUDICATION.

231. FORM.—Conveyances of bonds and dispositions in security, and decrees of adjudication, whether personal or feudalised, are exemplified in the Style-book (*a*). Their structure closely resembles that of the deeds noticed in § 227-30. In all instances it is essential to observe, that, although as regards the cedent, a conveyance of the debt will carry the adjudication as an accessory (*b*), yet to enable the disponee to complete a feudal right, the debts and subjects must be correctly specified and described; that where infeftment has not followed upon the deed or decree, it must be expressly assigned, it being usual, although not necessary, to specify the feudal clauses of the bond; and that where the bond or decree has been feudalised, proper executive clauses must be introduced in the disposition and assignation for enabling the disponee to obtain infeftment.

(*a*) Jurid. Styles, 1. 352 and foll.
(*b*) Wilson, 28th Feb. 1751, M. 40-1.

TITLE XIV. ENTRY WITH THE SUPERIOR.

232. UNDER REDEMPTION.—The form of entry with the superior does not essentially differ from that practised in absolute rights, except in regard to the quality of the right, which is declared to be redeemable *in terms of the bond* in voluntary securities, *and in terms of law* in adjudications.

233. VOLUNTARY RIGHTS.—1. *Holding base.*—In securities by bond, the lender, according to the uniform practice, holds blench of the debtor for payment of a penny Scots, if asked only; and although the bond contains an alternative obligation to infeft, and generally a procuratory of resignation, it is hardly possible to imagine any situation in which it can be necessary to enter with the debtor's superior (*a*). The superior cannot require the creditor to enter, because the conveyance is not of the fee, but of a redeemable right merely; and when the debtor allows the subject to fall in non-entry, it is competent for the lender, either by the form of voluntary or judicial sale, to denude him of his right. On the creditor's death, his heir is, in the ordinary case, entered by precept of *clare constat* granted by the debtor, the casualties of superiority and the expenses of entries being, by the terms of the bond, discharged in favour of the lender. Although that discharge ought to be contained in the dispositive clause, in order that it may be transferred to the sasine and the register, it has been decided that a disponee of the debtor cannot demand a composition for the entry of a disponee of the creditor (*b*).

2. *Holding a me.*—It may happen that the creditor has accepted of a bond with a public holding only: in this case it is essential to his safety that he obtain an entry from the debtor's superior, either by resignation or confirmation, the latter being the more convenient, and therefore the practical form. The question, whether the superior can demand a composition from the creditor, or his singular successors, is one which may perhaps be considered open. As the right of a disponee to an entry is coupled with the con-

dition that the party shall tender the sums due by law (*c*), the claim of the superior must be judged of by what was the law prior to the statute of Geo. II.; and in the act of 1669 (*d*), it is expressly mentioned that the adjudger of lands, annualrents and others, is liable in one year's rent. In a case where the superior demanded *a year's rent of the subject and sum* from the adjudger of an heritable bond, the Court held that he was bound to receive the adjudger *gratis*, but on the special ground that the superior was himself the debtor (*e*); and in another case, referred to in Art. 1, the demand was refused where the superior was a singular successor of the debtor, because, in purging the incumbrance, he must pay the expenses incurred in relation to the security. But, in the case of Seton, it was conceded that the right of the superior was good, *ex natura feudi*, and but for the specialty that the demand must have been sustained. The composition, if due, is a year's interest of the loan, which is equivalent to one year's rent of an annualrent right.

(*a*) *Note.*—It is believed that no attempt has been made by superiors to prohibit securities by base infeftment, and that where clauses prohibiting subinfeudation of the lands are introduced in feu-charters, there is uniformly an exception of infeftments in security. It seems, indeed, extremely questionable if such a restriction would be available to the superior; and it is manifestly for his advantage to permit the vassal to burden the fee at his pleasure. See § 51.

(*b*) Couper, 27th Feb. 1742, M. 15,058; Elch. *Sup. and V.* 6.

(*c*) 20 Geo. II. c. 20, § 12.

(*d*) 1669, c. 18; above, p. 218.

(*e*) Seton's Creditors, 13th Feb. 1702, M. 15,046.

234. ADJUDICATIONS.—(1.) It is necessary, when the debtor is infeft, to take a charter from the superior, in order to complete the adjudger's title in a question with voluntary disponees; (§ 222.) The distinguishing clause of the charter (*a*) is the *quæquidem* (*b*). In this, the mode in which the vassal has been divested, viz. by adjudication, is described, and the debt in security of which it has been led, specified. The *tenendas* and *reddendo* will be referred to if the creditor has not access to the titles (*c*). In the *precept* of *sasine* infeftment is warranted in the lands, *redeemably always conform to law, and salvo jure cujuslibet.* (2.) The composition payable

by an adjudger is, by statute, a year's rent of the *lands, annualrents or others* (*d*), which the Court are, however, in use to modify according to circumstances; and only one composition is payable, although there are several adjudgers. In Crown lands, the composition payable in Exchequer is one *per cent.* when the debt is not more than 10,000 merks Scots, and one-half *per cent.* if it exceeds that amount (*e*). (3.) Purchasers at judicial sales, and trustees under the bankrupt statute, enter as adjudgers, but the charter bears *heritably and irredeemably* (*f*). They pay a year's rent as composition. Adjudgers in implement are in the same situation. (See § 148.)

(*a*) Jurid. Styles, 1. 567.

(*b*) WHICH LANDS and others pertained heritably of before to C. holden by him of me as immediate lawful superior thereof and were by virtue of a decree of adjudication obtained at the instance of the said B. before the Lords of Council and Session upon the day of duly and lawfully adjudged from the said C. and all others having or pretending to have interest therein and decerned and declared to pertain and belong to the said B. and his foresaids heritably but redeemably as above mentioned in payment and satisfaction to him of the accumulated sum of £. *salvo justo calculo* and interest thereof from the date of the said decree during the not-redemption and that over and above the composition to the superiors and expenses of infeftment the abbreviate of which decree of adjudication is duly recorded upon the day of .

(*c*) Jurid. Styles, 1. 568.

(*d*) 1469, c. 36; 1669, c. 18. See above, p. 146, 218.

(*e*) Ersk. 2. 12. 24.

(*f*) See Jurid. Styles, 1. 566.

TITLE XV. RULES OF PREFERENCE.

235. REGISTERED SASINE THE TEST OF PREFERENCE.—(1.) Redeemable rights, like other rights completed by infeftment, are, as a general rule, preferable according *to the date and priority of the registrations of the sasines.* An exception is said to maintain in regard to the principal sum in the annualrent-right after the old form, as not being a real burden on the subjects (*a*). But redeemable rights are mere burdens upon the fee; and although, as being *debita fundi*—due out of the soil, they warrant poinding of the ground, and (with the exception of real liens and other burdens by reservation,).

authorise the creditor to enter into possession of the subjects, they are incapable, by possession for the prescriptive period, of becoming rights of property, unless followed by adjudication (*b*). Wadsets, however, and absolute dispositions qualified by back-bond, must be excepted, as they may be converted into real rights of property by a discharge of the reversion or back-bond (*c*). (2.) Voluntary rights in security, on which adjudication has proceeded, although, by means of certain ulterior proceedings, they may become rights of property or titles of prescription, still preserve the same order of preference in a ranking on the price or value of the subject. This is expressly provided for by statute. The preference thereby introduced with respect to apprisings (now adjudications) extends to such only as are led upon personal debts, and "without prejudice always of ground-annuals, annual-"rents due upon infeftment, and other real debts and *debita* "*fundi*, and of comprisings therefor of lands and others affect-"ed therewith, which shall be effectual and preferable accord-"ing to the laws and practick of this kingdom now stand-"ing (*d*)." (3.) Adjudication is useful, however, in this other respect, that it enables a creditor to obtain a preference for accumulations of interest, and for penalties; and in a competition he will be ranked for these, after deducting the sums drawn under the voluntary security. Adjudication for interest upon interest must be founded on a poinding of the ground (*e*).

(*a*) 1693, c. 13, above, p. 125. See Ersk. (Ivory's edit.) p. 426, note 179.

(*b*) Stair, 2. 10. 1.

(*c*) See Bell's Princ. 900.

(*d*) 1661, c. 62; Stair, as above; Ersk. 2. 3. 49, and 2. 8. 37. See Bell's Com. 1. 692-4.

(*e*) Ersk. 2. 8. 37, 2. 12. 67; Auchinbreck's Creditors, 12th July 1769, M. 14,129, 14,131; Douglas, Heron and Company, 2d Aug. 1781, M. 14,131; Grant, 2d March 1791, M. 14,139. See Dalrymple's Trustees, 18th May 1825, F. C., 4 S. 16.

CHAPTER V.

CONVEYANCES *MORTIS CAUSA*, OR DEEDS OF SUCCESSION.

TITLE I. GENERAL DISPOSITION AND SETTLEMENT.

236. SUCCESSION BY PROVISION.—The transmission of land rights from the dead to the living is regulated either by the will of the proprietor or fiar, or by law, *provisione hominis vel legis*. Heirs are thus *nati vel facti*,—by birth or by provision. The will or intention of the fiar is expressed in the form of a deed, which makes the law of succession of the particular estate. Where no deed has been executed, the succession is regulated by the law of inheritance. Conveyances or deeds of transmission *mortis causa*, are of various kinds, and will be noticed in the following order: 1. General disposition and settlement; 2. Special disposition and settlement; 3. Deed of entail; 4. Marriage settlement or contract; and Trust-disposition and settlement.

237. PURPOSE OF THE DEED.—The general disposition is employed when it is the intention of the granter to convey his whole property to a particular person unfettered by special provisions, and without the formality of feudal clauses. It is seldom, therefore, that this form of deed occurs in practice as a conveyance of heritage. The omission of those clauses renders it a mere obligation on the part of the granter to invest the disponee, which is made effectual on his death by the judicial form of adjudication in implement. The general disposition does not operate as a revocation of a prior special destination, unless where the intention of the granter is manifest from the terms of the deed (*a*).

(*a*) Weir, 7th Feb. 1745, M. 11, 359, 5 B. S. 224, Elch. *Presump.* 17; Drummond, 17th July 1782, M. 11,373; Hailes, 906; Royal Bank, 18th Nov. 1836, F. C., D. See Kirkpatrick, 7th Feb. 1765, M. 11,366.

238. FORM AND TERMS OF THE CONVEYANCE.—(1.) It is an established rule that the mere form or name of a deed, *e. g.* that it is a testament, does not prevent it operating as a conveyance of heritage, provided the proper words of transmission are used. A general disposition, therefore, to take effect at the granter's death, of the whole heritable and moveable estate of which he shall die possessed, is effectual if it contain dispositive words, in place of such terms as *legate and bequeath* (*a*). (2.) The word *dispone* may be considered essential to the conveyance of heritage; (above, § 45); but the other words usually in collocation do not appear to have any distinctive meaning. Thus the terms, *dispone, assign and convey*, are effectual to transmit the right to a debt secured by adjudication (*b*), but not *transfer, assign and make over* (*c*). (3.) With respect to the subject of the conveyance, the words used must clearly embrace heritage. Thus, all *moveable and immoveable subjects, of whatever denomination* (*d*); *every subject, whether heritable or moveable* (*e*); *all estate whatsoever, real or personal* (*f*); have been sustained as sufficient to ground adjudication of lands in implement; but the terms, *goods, gear, debts, &c. and other effects of what kind or nature soever*, do not carry heritable bonds or adjudications (*g*); and the terms, *goods, gear, means and effects heritable and moveable*, although comprehending heritable bonds, and decrees of adjudication for debt, have been held not to comprehend a proper feudal subject, such as a house (*h*). The form of this deed is simple, and will be found in the Style-book (*i*). (4.) The terms employed to designate the different kinds of heirs are explained below; (§ 244.) It may be observed here, that, in general dispositions of the whole heritage which shall belong to the granter at his death, the term, *heirs whomsoever*, is not interpreted so strictly as in special settlements, but is flexible according to circumstances (*k*).

(*a*) Ersk. 3. 8. 20.
(*b*) Robertson, 17th June 1785, M. 15,947.
(*c*) Galloway, 12th Jan. 1802, M. 15,950.
(*d*) Welsh, 28th June 1809, F. C.
(*e*) Glover, 7th Dec. 1810, F. C.
(*f*) Drummond, 17th July 1782, M. 2313.

(*g*) Ross, 2d March 1770, M. 5019 and 14,948; Hailes, 346, affirmed on ap. See Brown, 3d Dec. 1805, M. App. *v. Clause*, No. 5.

(*h*) Brown, 24th Dec. 1770, M. 5440.

(*i*) Jurid. Styles, 1. 264-5.

(*k*) See Farquharson, 2d March 1756, M. 2290, 6596, 5 B. S. 844.

TITLE II. SPECIAL DISPOSITION AND SETTLEMENT.

239. PURPOSE OF THE DEED.—This form of conveyance is employed when it is the intention of the granter to transmit a particular estate or subject to a favoured individual and his heirs; or failing the disponee, to certain other persons, who are styled substitutes. And the property may be conveyed either as a simple or limited fee (*a*). This deed is substantially an entail without the restraining clauses; and although it is not so much a favourite in modern practice as the trust-deed, it is still occasionally employed by those who dislike the machinery of a trust, or where the subjects are of small value. It will be convenient, therefore, to consider it as introductory to the subject of the *strict entail*, and thus clear the way for the more complex clauses of that form of settlement.

(*a*) Jurid. Styles, 1. 223.

240. FORM.—A special disposition *mortis causa* does not materially differ in the feudal clauses from the disposition of sale; (see § 131, *et seq.*) It bears a reservation of the granter's life-rent, a power to alter, and a clause dispensing with the delivery, in order that the granter's control over the subject may be preserved entire, since it is essential to the validity of a conveyance of heritage that the dispositive words be *de præsenti* and absolute (*a*). A clause of absolute warrandice, although unusual, is not inapplicable, where the granter intends that the disponee shall have a preference in a question with his representatives (*b*). The dispositive clause, as embracing what is peculiar to the special settlement, requires particular notice.

(*a*) Ersk. 3. 8. 20; Campbell, 28th Nov. 1770, M. 14,949.

(*b*) See Coventry, 8th July 1834, F. C., 12 S. 895.

241. DISPOSITIVE CLAUSE.—CONSTITUTION OF REAL LIEN.—This form of conveyance is not unfrequently used for

giving a subject to a favoured individual, under the burden of the granter's debts in general, or of particular debts or legacies; or of sums of money which are to form a *real lien* upon the property. Burdens which are sufficiently described in the deed become imposed on the disponee by his acceptance of the conveyance; but the strongest expressions of mere personal obligation are ineffectual to constitute a real lien as against the lands. It is thus necessary that the conveyance be duly feudalised, with all its burdens; and as the disponee has a manifest interest to exclude the latter from the instrument of sasine, it may not, in every instance, be expedient to intrust the deed to his uncontrolled disposal. An irritancy cannot add to the security of those interested in the reserved burdens, unless it be transferred to the sasine. The general effect of a real lien is explained above; (§ 136.) It authorises poinding of the ground, and is a title of adjudication; but a power of sale seems inapplicable to such a security, although competent with reference to a burden reserved in favour of the disponer. It is suggested, as an apparently competent mode of making a real lien of greater force and effect, to add a faculty and power to the favoured person to grant warrant for the infeftment of a proper heritable creditor by constitution (*a*). The effect of such a faculty is explained above; (§ 136. 3.)

(*a*) DECLARING always as it is hereby expressly PROVIDED and DECLARED that this present disposition is made and granted under the express burden of the sum of L. in favour of and payable to C. and his heirs and assignees with a fifth part more of penalty in case of failure in punctual payment thereof at the first term of Whitsunday or Martinmas which shall happen after my death with the lawful interest of the said principal sum thereafter during the not payment which sums of principal interest and penalty are hereby declared a real and preferable burden affecting the said lands and others and are appointed to be inserted in the infeftments to follow hereupon and in all the future transmissions and investitures of the said lands and others ay and until complete payment be made thereof AND in the event of the said principal sum remaining unpaid after the term of payment foresaid full power and faculty are hereby reserved in favour of and expressly given to the said C. to burden and affect the said lands and others with debt to the amount of the said sums of principal interest and penalty and to grant warrants and precepts for infeftment therein in security of the said sums or of any part of the said principal sum with interest and penalty corresponding thereto containing powers of sale of the said lands and others and all other usual and necessary clauses.

242. FEE AND LIFERENT.—The special disposition and settlement is frequently employed to confer rights of a distinct nature upon two individuals in the same subject, that of the one being temporary and the other permanent. The rights of fee and liferent may, however, be separately constituted.

1. *Direct conveyance in fee and liferent.*—This is effected by means of the terms, *to A. in liferent, and to B. in fee;* the obligation to infeft being expressed in similar terms, and the precept of sasine containing warrant to give *liferent state and sasine* to the former, *and heritable state and sasine* to the latter. And although a succession of liferents in perpetuity cannot be created, there appears to be no incompetency in a substitution of liferents conceived in favour of persons in existence (*a*).

2. *Direct conveyance in liferent.*—A disposition may be granted in liferent simply, leaving the fee to descend to the heir of the granter, or separate conveyances may be executed of the two rights. It is competent to assign an unexecuted deed of conveyance, with its feudal clauses, to the effect of authorising infeftment in liferent only. This form was customary in the constitution of freehold votes. (See note, p. 207.)

3. *Liferent by reservation.*—This species of right is opposed to liferent by constitution, which is created as above. A reserved liferent consists of what remains after granting a disposition of the fee to take effect on the death of the disponer. It is usually combined with a reserved power of sale, and to burden the subjects with debt (*b*). It is plainly essential to this sort of liferent, that the grantee be infefted at the date of the conveyance, and that he shall continue undivested by the new infeftment. Thus, one who conveys a personal right, under reservation of his own liferent of the lands, is not a liferenter by reservation in the feudal sense of the term (*c*). Thus, also, the granter of a disposition in favour of himself in liferent, and another in fee, will, by infeftment on the conveyance, be on the one hand entirely divested, and on the other acquire a liferent by new constitution.

4. *Joint liferent.*—A right of liferent may be constituted in favour of two or more parties, and the rules of

interpretation seem to be the same as those which apply to a joint conveyance in fee; (§ 243.) The difficulty supposed to exist when the subject is indivisible, or would suffer from division, seems to be imaginary, as the yearly fruits or returns cannot be of that nature (*d*).

5. *Effect of infeftment.*—Where the right of liferent is reserved, new infeftment is unnecessary, the disponer remaining undivested, and thus holding an infeftment to the extent of the liferent. Where, again, it is a right by constitution, infeftment is competent in the rights of liferent and fee jointly, or in either separately (*e*), the sasine bearing liferent state and sasine, or heritable state and sasine, according as the right completed is one of liferent or of fee. (See § 74. 3.)

6. *Powers of the liferenter.*—Liferent is classed by our systematic writers among servitudes. Nevertheless it cannot be constituted without infeftment. (1.) The powers of a liferenter are limited by the obligation which he lies under to enjoy the subject *salva re substantia*, and by our former law he behoved to find caution (*f*) to the fiar. In a feudal sense, his powers differ according as the right is by reservation, or by constitution. But under neither of these forms can the liferenter give a feudal investiture to another in the liferent. The right is considered personal and incommunicable, although the power to exercise it may be given by assignation. (2.) A liferenter by reservation has, in virtue of his original infeftment, the privilege of entering the heirs, and even the disponees of vassals,—a power which does not belong to a liferenter by constitution, unless combined with a matrimonial fee (*g*). It may be doubted if it is competent, even by an express clause, to invest a liferenter by constitution with the power of entering vassals. It has been held, that a charter by progress granted under such a power, was not effectual after the death of the liferenter (*h*); and it is thought that in a competition, a title of that nature would not to any effect be sustained. It appears inconsistent with feudal principles, that an infeftment in the fee of lands, whether original or by progress, which is defeasible by the death of the granter, should be at all available, unless the deeds of investiture and the register bear the limitation of the right. (3.) It may perhaps be doubted if a liferenter,

whether by constitution or reservation, can receive resignations *ad remanentiam*, unless he hold special powers to that effect, as commissioner of the fiar. The acceptance of resignation *ad remanentiam* differs essentially from resignation *in favorem*, as affecting the rights of the superior; whereas the latter is a mere formal step for the benefit of another party. Were a liferenter to enjoy this power, he might materially compromise the interests of the fiar without his consent (*i*). Resignation *ad remanentiam* is a mode not of renewing, but of extinguishing a subaltern fee. (See *Resignation ad Remanentiam.*)

(*a*) Bell's Princ. 1721; Allardice, 6th March 1795, Bell, 56. See Baillie, 17th June 1776, M. 14,941; Waddel, 9th July 1833, F. C., 11 S. 949.

(*b*) RESERVING not only my own liferent of the foresaid lands and others but also full power and liberty to me at any time of my life or even on deathbed to ALTER REVOKE or INNOVATE these presents in whole or in part and also to SELL ALIENATE and DISPONE the same CONTRACT DEBTS thereupon or even gratuitously to dispose thereof in the same manner and as freely in all respects as I might have done before granting these presents.

(*c*) Ersk. 2. 9. 41-2; Bell's Princ. 1040.

(*d*) See Bell's Princ. 1067.

(*e*) Grahame, 4th July 1759, M. 6931; Dundas, 23d Jan. 1823, 2 S. 145; Falconer, 20th Jan. 1825, F. C., 3 S. 455.

(*f*) 1491, c. 25; 1535, c. 15.

(*g*) Ersk. as above; Craig, 1. 9. 11; 2. 22. 5; Stair, 2. 6. 4-11; Bell's Princ. 1037, 1041; Henderson, 19th Feb. 1836, 14 D. 540.

(*h*) Redfearn, 7th March 1816, F. C.

(*i*) See Hunter, 16th Dec. 1834, F. C., 13 S. 205, above § 56. 7.

243. CONJUNCT RIGHTS.—The structure of the clause is more complex when property is destined to two or more persons in conjunct fee, or in conjunct fee and liferent. In a conveyance to strangers, (those not in the relation of husband and wife or parent and child,) the legal interpretation follows the ordinary meaning of the words (*a*). (1.) Thus, a conveyance to two individuals *in conjunct fee and liferent, and their heirs*, vests the fee in them equally during their joint lives. After the death of one, the other enjoys the liferent of the entire subject, and on his decease, the fee belongs equally to the heirs of both. (2.) Where, again, it is intended that they shall be joint fiars during their lives, but that the fee shall divide on the decease of one, and the survivor enjoy one half only, the terms will be

to *A. and B. jointly, and their heirs.* (3.) The terms, to *A. and B. jointly, and to the said B. in the event of his survivance, and his heirs,* will give the entire fee to B. on A.'s predecease; but if A. should be the survivor, the effect will be the same as in the second example. (4.) If the survivor, whether A. or B., is the intended fiar, the conveyance will be conceived in favour of *A. and B., and the longest liver of them, and his heirs.* The words, *their heirs,* are likewise construed to mean the heirs of the survivor, although their import in marriage-contracts is not so clear. Under a right of this last description, the share of each of the conjunct fiars is attachable for his own debts during their joint lives, and that of the predeceasing fiar descends to the survivor in so far only as it exceeds the debts of the deceased (*b*). (5.) Where this result is to be avoided, the right of the disponee first deceasing must be restricted to a liferent. A clause conceived "*to and in favour of A. and B., and the longest liver in liferent, for their life-rent use allenarly, and the heirs of the said B. (or A.) in fee,*" will limit the right of A. and B. to a bare liferent; and if the liferent of one of the parties is to be of a half only, it may be expressed thus, "*to and in favour of the said A. and B., equally between them, in liferent, and to the said B. (or A.) and his heirs, in fee* (*c*)." Rights to husband and wife, and parent and child, are noticed below. (See *Marriage-Contract.*)

(*a*) Erak. 3. 8. 35.
(*b*) Last refer.
(*c*) Last refer.; Jurid. Styles, 1. 125.

244. TERMS DESCRIPTIVE OF HEIRS. — The dispositive clause may contain a substitution of persons in succession after the disponee, and it is of importance to mark the precise import of the terms descriptive of the different kinds of heirs. The word, *heirs,* has a general signification, and means those who take by law or destination, whether of *line, conquest* or *provision,* according to circumstances. (1.) *Heir of line* is the heir-at-law in an unlimited fee, or fee-simple as it is styled. It is nearly synonymous with *heir-at-law, heir-general, heir whomsoever or whatsoever;* but although the two charac-

ters may unite in one and the same individual, it can never import, in an abstract sense, heir-male or heir of conquest. (2.) *Heir of conquest* is the heir *in feuda nova*—fees acquired otherwise than by succession by one of three or more brothers, not the eldest or the youngest. Such heir is the immediate elder brother, or his representative, and is contradistinguished from the heir in heritage, who is the immediate younger brother, or his representative, it being assumed that the deceasing brother leaves no heirs of his body. When the youngest of several brothers dies without issue, the immediate elder brother is heir both of line and of conquest (*a*). (3.) *Heirs-portioners* are females in the same degree of propinquity, *e. g.* daughters, sisters or nieces of the deceased, who succeed to equal shares *pro indiviso*. Conquest has no place among females: on the death of a female leaving no male heir, her sisters, or other nearest representatives, take equally (*b*). (4.) *Heir-male* is uniformly an heir of provision by the destination of an ancestor more or less remote, and means the nearest male heir connected by males, and exclusive of females and males connected by females. The term, *heirs-male*, although in the plural number, has a singular signification. An estate provided to the heirs-male of a marriage, or of the body of a particular individual, descends to the eldest son; a rule which indeed applies universally to the term heirs, used in the plural number, except with reference to heirs-portioners, and heirs of conquest in marriage-settlements. It follows, that under a destination to *A.*, *and the heirs-male of his body, and the heirs whatsoever of the body of the said heirs-male*, the heir whatsoever of the eldest son of A.'s body will take in preference to the second son of A. (*c*). An heir-male may be heir of conquest. For example, when a destination is conceived in favour of one and his heirs-male, it would seem that his immediate elder brother (failing issue of the body of the deceased) will take, as heir-male of conquest, in preference to the immediate younger brother as heir-male of line (*d*), unless the words, *heir-male of line*, are employed (*e*). *Heir-male of the body*, means precisely what the words in their ordinary sense import—the eldest son or his descendant being a male connected by males. (5.) *Heir-female* is the heir-at-

law, whether a female, or a male connected by a female, failing heirs-male. Thus the granddaughter by a son takes in preference to the grandson by a daughter (*f*). Questions of difficulty have arisen from the use of the word *daughter* in destinations, which is not synonymous in legal import with heir-female. Thus, under the terms, *eldest daughter*, or *heir-female of a marriage*, the daughter of the heir-male of the marriage is preferred to his sister (*g*), the term, eldest daughter, being here qualified and explained by that of heir-female. Apart, however, from qualifying expressions, the terms, *daughter*, or *eldest or only daughter*, means the immediate daughter of the marriage, and is not synonymous with *heir-female being a female* (*h*). (6.) The terms, *heirs*, or *heirs and successors, or heirs and assignees whomsoever, or whatsoever*, mean the heir-at-law, in contradistinction to the heir by destination or provision: they are nearly synonymous with heir of line, and heir-general, but differ in this, that they embrace the heir of conquest (*i*). The flexibility of the terms seems to be very limited. When used in regard to the pertinents or accessories of lands, they have in some instances been interpreted by reference to other deeds (*k*); but in special settlements of proper feudal subjects, the technical meaning will prevail, unless controlled by words occurring in the same deed. Thus the term, *heirs whomsoever*, will not be interpreted by reference to a prior destination to *heirs-male*; but the expression *heir-male*, which is exclusive, employed in another clause of the deed so as to mark intention, will limit their import (*l*). Express words are necessary to restrict the application of the term to *heirs of the body*. Thus a conveyance *to A., and his heirs and successors whomsoever, whom failing without a lawful child or children existing of his body, to B.*, import a right in B. preferable to that of the heirs of A., not the issue of his own body, the meaning of the term, heirs and successors whomsoever, being controlled by the words which follow (*m*). (7.) *Eldest daughter or eldest son*, means the child who is such at the time when the succession opens (*n*).—See, on the subject of this section, the authorities in the note (*o*).

(*a*) Grant, 29th Nov. 1757, M. 14,874; Cunninghame, 7th Dec. 1770, M. 14,875.

(*b*) Carse, 5th Feb. 1717, M. 14,873; Adams, Jan. 1727, M. 14,873.

(*c*) Lockhart, 19th Jan. 1737, F. C., 15 D. 376 affirmed.

(*d*) See Dunbar, 24th June 1625, M. 5605.

(*e*) Sinclair, 24th June 1766, M. 14,944, affirmed on ap.

(*f*) Hope, (Bargeny case,) July 1738, Elch. *Prov. to Heirs*, 2, as reversed in H. of L., Cr. and St. 1. 237.

(*g*) Lyon *v.* Blair, 19th June 1739, 5 B. S. 663.

(*h*) L. Essex Ker, 13th Nov. 1810, F. C.; affirmed, 26th Feb. 1812.

(*i*) D. Hamilton, 4th March 1771, M. 4358, 4369, 5 B. S. 467.

(*k*) Hay, 16th Nov. 1698, M. 14,899.

(*l*) Sandford on Success. 1. 192; M. Clydesdale, 26th Jan. 1726, M. 14,930, altered by D. Hamilton, 9th Dec. 1762, M. 4358; Maclauchlan, 12th Jan. 1757, M. 2312.

(*m*) Tinnoch, 26th Nov. 1817, F. C. See Suttles, 19th Jan. 1809, F. C.

(*n*) Ker, (Roxburghe,) 23d June 1807, M. App. *Tailzie*, No. 13; affirmed on ap.; Shepherd *v.* Grant, 1st Dec. 1836, F. C., 15 D. 173; affirmed, June 1838.

(*o*) Ersk. 3. 8. 47. *et seq.*; Bell's Princ. 1694, *et seq.*

245. DESTINATIONS.—1. *Institute.*—Conveyances containing a destination in favour of a disponee and a series of heirs are often classed under the general denomination of tailzies; a term derived from the French word, *tailler*, to cut, the legal course of succession being thereby interrupted. They contain destinations either simple or with prohibitions, or take the form of the strict entail, to which alone the term *entail* is in practice applied. The first person called to the succession is styled the *disponee* or *institute*, and those postponed to him, *heirs* or *substitutes*. An institution may be *absolute* or *conditional*. The former is the common case of a direct conveyance to a particular individual in existence or *nasciturus*, as the case may be.

2. *Conditional institution.*—(1.) This term is more commonly employed with respect to destinations of sums of money than of heritage. Its meaning in feudal conveyancing is by no means precise. By the Civil law, substitutions in most cases resolved into conditional institutions, "and meant no more "than if the institute either died before the granter, or de- "clined to accept of the right, the substitute might take the "succession: But when the institute took up the succession, "the substitution evanished, and the succession, after the death "of the institute, devolved not on the substitute, but on the "heir of the institute" (*a*). In this sense conditional institu-

tion is not received in our law; the condition must be expressed, and this may be done in either of two forms, by a conveyance by *A. to B., failing heirs of A.'s body*, or equivalent terms (*b*), *or by A. to the heirs of his body, whom failing, to B.* Under these forms B. is styled a conditional institute. (2.) But there is a distinction to be observed between the effects of these two modes of destination. Under the first, B. is a proper disponee, (since to the heirs of A.'s body there is no conveyance,) subject to the condition that these heirs shall fail. Hence, on the existence of an heir of the body of A., such heir will take not under the conveyance but as heir-at-law, and the disposition to B. will be evacuated. A conveyance, therefore, by A., *failing heirs of his own body, to B.*, has the precise effect of the Roman substitution. On the other hand, the latter form of conveyance above exemplified is a conditional institution only in so far as it vests the immediate right in B. conditionally, on A.'s dying without issue. The condition being purified, B. is necessarily the disponee or first person in whom the right vests. But when A. is survived by an heir of his body, the right vests in such heir as institute, and B. acquires the character of a proper substitute; for his right of succession is not evacuated by an heir of the body of A. taking as disponee. There is thus a material distinction between the terms, *quibus deficientibus*, and *quibus non existentibus*. A conveyance, therefore, by *A. to the heirs of his body, whom failing, to B.*, is not a proper conditional institution, nor has the application of that term to this form of destination been uniform (*c*).

3. *Substitutes.*—(1.) The heirs called to the succession after the institute are styled substitutes. To them the dispositive words provisionally apply; in other words, the subject, on the death of the institute, whether prior or subsequent to that of the disponer, passes to the substitutes in their order, without respect of the proper heirs of the institute unless expressly called to the succession. For example, where an estate is conveyed *to A., whom failing, to B.*, without mention of A.'s heirs, the succession opens to B. on the decease of A. without having altered the destination, to the exclusion of A.'s heirs (*d*). (2.) The terms of the destination, therefore, form

the law of the succession. Thus, under a destination *to A. and the heirs of his body, in fee, whom failing, to B.*, the latter is preferred to the heirs whomsoever of A. This is one of the simplest forms of substitution. Again, suppose a destination *to the heir-male of a marriage, and his heirs and assignees whatsoever; whom failing, to the heir-male of any subsequent marriage of the husband, and the heirs of his body; whom failing, to the heir-female or eldest daughter of the first marriage, and the heirs of her body*, and the heir-male of the first marriage takes up the succession but dies without issue; in a question between the heir-female of the first marriage and her younger sisters claiming as heirs-portioners of the heir-male, the latter, from the texture of the clause, will necessarily prevail (*e*). These instances are sufficient to shew the nature of a substitution. (3.) It is material to observe, that (when the destination has not been altered) the right of a substitute is absolute, and that it is the form of completing his title only which is contingent on the vesting of the right in the immediately prior substitute. Thus, under a conveyance to *A.*, *and the heirs of his body, whom failing, to their heirs*, followed by other substitutions if an heir of the body should exist, it is by no means necessary for transmitting a right to his heir whomsoever, that such heir of the body should have made up a title to the subjects, or even that a right should have been vested in him by service. The effect of the right not vesting is merely that the heir whomsoever must complete his title by service to A., in place of to the heir of A.'s body (*f*). (4.) It is now fixed that a branch of a destination may be introduced by the nomination and appointment of the granter, expressed in a separate writ, when power has been expressly reserved in the settlement (*g*). A substitution of heirs *nominandi* appears, indeed, to have been usual at an early period, as we learn from Dallas, who embodies the necessary form in the ordinary styles of the entail. Heirs to be named are not more uncertain than heirs *nascituri*, to be born, and it has never been doubted that these may provisionally be called to the succession. (5.) A substitution is usually marked by the words *whom failing*, although these are not essential. Thus, a conveyance to A. and his heirs implies a substitution to the heirs, who are not joint fiars, but

have a bare right of expectancy and must take by service. Thus, also, under a clause *to myself, and to B., my only lawful son, and the heirs-male of his body*, &c. or *to myself and B., and longest liver of us two, in liferent and conjunct fee, for B.'s liferent use thereof allenarly, and to C. and the heirs-male of his body, whom failing*, &c. B. in the one case, and C. in the other, is a mere substitute (*h*).

(*a*) Ersk. 3. 8. 44.

(*b*) See Stevenson, 24th June 1784, M. 14,862; Leitch's Trustees, 2d June 1826, F. C.

(*c*) See Dickson, 23d Feb. 1697, M. 14,851; Forbes, 3d Aug. 1756, M. 14,859; Colquhoun, 8th July 1831, F. C., 9 S. 911; Murray, 21st May 1833, F. C., 11 S. 629.

(*d*) Ersk. as above; Bell's Princ. 1704; Campbell, 28th Nov. 1770, M. 14,949; Hailes, 371.

(*e*) Richardson, 5th July 1821, F. C. See Lockhart, 19th Jan, 1837, F. C., 15 D. 376.

(*f*) Stair, 3. 5. 51; Livingstone, 3d March 1762, M. 15,409, 15,418, affirmed on ap.; Gordon, 23d Feb. 1791, M. 15,465.

(*g*) Murray, 22d June 1774, M. 14,952.

(*h*) Porterfield, 15th May 1821, F. C., and House of Lords, 2 W. S. 369; also 18th Nov. 1829, F. C., 8 S. 16, affirmed, 5 W. S. The clause of destination is in these terms: "Binds and obliges him and his heirs and successors "with all possible diligence upon his own charges and expenses duly and validly "to infeft and seise the said William Porterfield his said son and the said Julian "Steel spouses and the longest liver of them two in conjunct fee and liferent and "the heirs-male procreate or to be procreate of the said marriage betwixt the "said William Porterfield and Julian Steel; whilks failing the heirs-male of "the body of the said William Porterfield of any other marriage whilks failing "the heirs-male of the body of the said Alexander Porterfield whilks failing the "eldest heir-female of the body of the said William Porterfield and the descen-"dants of the body of the said eldest heir-female without division whilks failing "the next heir-female *successive* of the body of the said William Porterfield and "the descendants of the body of the said next heir-female *successive* all without "division *whilks failing any other heirs of tailzie to be nominated and appointed "by the said Alexander Porterfield by write under his hand at any time in his life-"time in his liege poustie whilks failing the eldest heir-female*," &c. &c.—Strathmore, 1st Feb. 1837, F. C., 15 D. 449.

246. CONSTRUCTION OF DESTINATIONS.—1. *General rule.*—It is a general rule in construing technical terms in destinations, to take the meaning which the law has bestowed upon the words, without reference to the context or extraneous matter (*a*). (1.) Thus, under a conveyance to *a son and his heirs-male and assignees whatsoever, whom failing, to the father's*

other nearest heirs; the heir-male (although not of the body) of the son predeceasing the granter, is preferred to the granter's daughters, without regard to probable intention (*b*). (2.) Again, in a destination to *A. and B. nominatim et seriatim, and the heirs-male of their bodies; whom failing, to C. and his lawful heirs-male; whom failing, to the heirs-female of D.;* the term lawful heirs-male being unambiguous, and not limited to issue male or heirs-male of the body, the heir-male general of C. is preferable to D.'s heir-female (*c*). (3.) Thus, also, where an estate was disponed by A. *to the eldest son living at the time of his decease, procreated between his eldest daughter B. and her husband, and the heirs-male of his body, in fee; whom failing, to the eldest son of C. and of D. (the second and third daughters of A.) seriatim, and his heirs-male; whom failing, to the second son of each of the three daughters seriatim, and his heirs-male; whom failing, to the heirs-male of the three daughters in the same order of succession;* in a competition between the fourth son of B. and the eldest son of the third son of C., upon the failure of prior heirs, the former was preferred as undoubted heir-male of B. (*d*).

2. *Exceptions.*—Exceptions are admitted to the general rules of construction. (1.) Express declaration or necessary implication will control the meaning of technical terms. For example, a destination to the *eldest daughter of a marriage without division, and their heirs-male, whom all failing, and their said heirs-male, to the granter's nearest and lawful heirs whomsoever,* imports the subsitution of the heirs-male of all the daughters in their order; and the *heirs-male of a daughter, she always marrying a person of lawful descent,* import the heirs-male of her body (*e*). Again, where lands were destined to *A. and the heirs of his body; whom failing before the granter, then to B., the immediate younger brother of A., and the heirs of his body; whom all failing, then to the granter's own nearest heirs and assignees whomsoever,* and B. was in the other clauses of the deed referred to as a substitute, and not a mere conditional institute, he was preferred on the decease of A., who had survived the granter, to the heirs whatsoever of the granter and the heir of conquest of A. The latter claimed on the ground that the destination was at an end by the survivance of A., and the former maintained that the succession upon A.'s

death opened to the heirs whomsoever of the granter (*f*). (2.) But the Court will not disregard the technical meaning of terms used in the dispositive clause, although words of a broader import may occur in another part of the deed. Thus, where the dispositive clause contained the term *heirs-male of the body*, and the procuratory of resignation, that of *heirs of the body* generally, the former were held to be the ruling words (*g*). The dispositive clause, as the leading branch of the deed, is taken to be engrossed in the procuratory of resignation and precept of sasine, which, as mere executive clauses, cannot control, although their terms may, in favourable and peculiar circumstances, be admitted to explain, the clause of conveyance. Thus, the omission of the heirs of one of the substitutes in the dispositive clause of a deed of entail was allowed to be supplied from the procuratory of resignation, the blunder being considered palpable; but the decision ought not to be relied on in practice (*h*).

(*a*) Bell's Princ. 1694, and auth. cit.

(*b*) Campbell, 28th Nov. 1770, M. 14,949.

(*c*) Hay, 24th July 1788, M. 2315, affirmed on ap.

(*d*) Shepherd *v.* Grant, 1st Dec. 1836, F. C., 15 D. 173, affirmed, June 1838.

(*e*) Ker, (*Roxburghe case,*) 23d June 1807, M. App. *v. Tailzie,* No. 13, affirmed on ap.

(*f*) Govan Smith, 14th Dec. 1830, F. C., 9 S. 160.

(*g*) Forester, 11th July 1826, F. C., S.

(*h*) Sutherland, 26th Feb. 1801, M. App. *v. Tailzie,* No. 8. See Shanks, 27th Jan. 1797, M. 4295.

247. PRACTICAL RULES.—The cases noticed in § 246. point out the inconvenience of inaccurate expressions in destinations. As the meaning of the technical terms is well defined, the conveyancer can have little difficulty in framing clauses of whatever length. (1.) It is a practical rule not to be lightly disregarded, to employ the words, *whom failing*, to denote a substitution, as these necessarily exclude all doubt as to the character of the members of the destination. (2.) A destination in the simplest form may be thus expressed: *To and in favour of A. and the heirs (or heirs-male) of his body; whom failing, to B. and the heirs (or heirs-male) of his body*, and so

on; *whom all failing to the heirs and assignees whomsoever of the granter.* (3.) The introduction of heirs-female will be accomplished by this form of words: *To and in favour of A. and the heirs-male of his body; whom failing, to the heirs-female of his body, the eldest heir-female always succeeding without division, and excluding heirs-portioners; whom failing, &c.;* but under a destination thus expressed, it will be observed, that the daughter of a son will exclude the immediate daughter of the marriage, which is besides consistent with the ordinary rules of succession. When it is intended, therefore, for particular reasons, to favour the latter, the clause will be in the following terms: *To and in favour of A. and the heirs-male of his body; whom failing, to the eldest daughter procreated or to be procreated of his body, and her heirs-male; whom failing, to the heirs-female, &c.* (4.) A mutual substitution may be thus expressed: *To A. and B. and the heirs of their bodies, and failing either of them without heirs of his body, to the survivor of the said A. and B., and the heirs of his body, whom failing, &c.;* and the following terms may be employed to give a power of redemption: *In case of the death of the said B. without heirs-male of his body, the said lands are and shall be redeemable by C., or the heirs-male of his body, from the person succeeding to the said B. or the heirs-male of his body, or from any other of the substitutes before expressed, by payment to the person so in possession of the sum of £. at any term of or the said C. or his heirs-male shall think fit.* (5.) When it is the intention to give an estate to one and his own family only, and failing them to another, care must be taken to employ the words, *heirs of his body.* Thus, where lands were disponed *to A., his heirs and assignees, whom failing, to B., and his heirs and assignees,* the sister-german of A., on the failure of his children, was preferred to B. (*a*). Thus, also, under a destination by *A. to his son B., and his heirs-male, whom failing, to the heir-female of the body of A.,* the heir-male general of B. after or failing his own sons, will be preferred to the daughter of the granter; (§ 46. 1.) Other examples of the danger of the incorrect use of technical terms can be easily figured.

(*a*) Baillie, 17th June 1766, M. 14,941; Hailes, 64; 5 B. S. 928, as reversed, 26th March 1770.

248. DESTINATIONS SIMPLE OR WITH PROHIBITIONS.—The special settlement may contain a destination either simple or fenced with prohibitory clauses. (1.) A simple destination is defeasible by the institute or the substitute heir in possession, who has the power gratuitously to alter the law of the succession. Such alteration must, however, be express. Thus a party, who is both heir of line and heir of provision under a simple destination, although he may validly complete a title in either character, does not, by service and infeftment as heir of line, vacate the destination. The *spes successionis* of the heirs of provision can only be defeated by a direct conveyance to another, or by the fiar's resignation in favour of himself completed by charter from the superior, since, until altered by one having the power of disposal, the appointment of the former proprietor controls the ordinary law of succession (*a*). A clause of redemption in a settlement is subject to the same rule (*b*). (2.) But a *clause of return*, whereby the granter closes a destination with himself or his heirs, is interpreted according to circumstances. *First*, If the conveyance or grant be onerous, fulfilling a legal obligation, a clause of return being thus gratuitous may be gratuitously defeated; *secondly*, If the conveyance be gratuitous, a clause of return is regarded as a condition of the grant; and as the grant must be taken and held subject to the condition, it cannot be gratuitously taken out of the provisional line of succession; *thirdly*, If the clause be conceived in favour of a third party, it resolves substantially into a substitution, and is consequently defeasible by the institute or prior substitutes at pleasure; *fourthly*, Where the return in a gratuitous conveyance, being to the granter himself, does not immediately follow the grant to the institute and his heirs, but is preceded by interposed substitutions, it seems to be defeasible by the institute, or any substitute but the last, since a *jus crediti*, effectual for opposing an alteration of the destination, does not belong to the substitutes, and cannot arise to the granter, so long as there are interposed parties, who have a prior right of succession (*c*). (3.) If it is the wish of the maker of a settlement to restrain the institute and substitutes from defeating the destination, unless for onerous considerations, the deed must contain a *prohibitory*

clause, which is introduced as a limitation and restriction of the right, and confers a right on the future heirs to object not only to an alteration of, but even to an addition to the destination, and bars the heir in possession from imposing limitations and restrictions upon his successors. They have a right to the estate *tantum et tale* as it was left by the ancestor, so long as it remains unaffected by the debts or onerous deeds of their predecessors (*d*). (4.) But a mere prohibition against alienation, or altering the order of succession, not fortified by irritant and resolutive clauses, does not restrain the institute or substitutes from selling the estate, or burdening it with debt, or with provisions to husbands or wives, or children (*e*); nor does it warrant inhibition, or save the estate from the diligence of creditors (*f*), or import an obligation on the heir or person who contravenes to reinvest the price, subject to the provisions of the settlement (*g*). But an obligation of this nature may, in express terms, be laid on the institute or substitutes (*h*).

(*a*) Stair, 2. 3. 43; Edgar, 31st May 1742, Cr. and St. 1. 334, M. 3089-90; Elch. *v. Serv. and Conf.* 6; Snodgrass, 16th Dec. 1806, M. App. *v. Serv. of Heirs*, No. 1; Harvie, 12th Dec. 1811, F. C. See Molle, 13th Dec. 1811, F. C.

(*b*) Græme's Trustees, 1791, M. 4329; Clayton, 1791, M. 2345.

(*c*) Ersk. 3. 8. 45; Bell's Princ. 1705, and cases cited. See Mackay, 13th Jan. 1835, 13 S. 246, and opinion of Lord Medwyn.

(*d*) Menzies, 25th June 1785, M. 15,436; Meldrum, 29th June 1827, F. C., 5 S. 857; E. of Fife, 7th March 1828, F. C., 6 S. 698.

(*e*) Lockhart, 27th Jan. 1761, M. 12,345; Cunningham, 5th Aug. 1778, M. 15,526.

(*f*) Ersk. 3. 8. 23; Bell's Princ. 1718, and cases cited; Chapman *v.* Bryson, 16th Nov. 1759, 27th Jan. 1760, M. 15,511, 5 B. S. 873, 940; Mitchelson, 15th June 1831, 9 S. 741.

(*g*) Bell's Princ. 1719, and cases cited.

(*h*) PROVIDED ALWAYS as it is hereby expressly PROVIDED and DECLARED that in case my said disponee or any of my said heirs of provision before written shall in order to disappoint the full meaning and intent of these presents sell the said lands or any part thereof or otherwise dispose of the same for onerous causes, they shall be obliged to employ the price or value thereof towards the purchase of other lands or on sufficient security and to take the rights thereof under the same substitutions conditions and limitations as are herein contained.

249. PRECEPT OF SASINE, &c.—The clauses which follow the *dispositive*, do not materially differ from the same clauses in the disposition of sale. The *precept of sasine* warrants in-

feftment to the disponee, and failing him, the substitutes in their order; and if there is a conveyance in liferent, the precept will be adapted to the circumstances. Prohibitions and reserved burdens will be noticed by reference to them, as expressed in the dispositive clause. At the end of the precept of sasine is introduced a reservation of power to the granter to *alter and revoke* the deed at pleasure, a power which he possesses at common law so long as the deed remains undelivered, (above, § 19, 20,) but which is essential to authorise revocation or alteration after delivery, or what is equivalent, infeftment upon, or the registration of the settlement. (See *Entail.*)

250. INFEFTMENT.—The special settlement as a feudal conveyance is completed by infeftment followed by a registered sasine. (1.) The attention of the conveyancer will be specially directed to the reserved burdens, if any such have been declared, in order that they may be duly feudalised; and circumstances may exist to render it prudent for parties interested in the succession to observe the proceedings of the disponee. Instances have occurred of the omission from the instrument of sasine, of provisions expressed in the settlement; and whether these have happened through mistake or design, it is equally the interest of the favoured parties to see that sums which the granter intended for their behoof are made burdens on the infeftment. It is in this respect that the special settlement fails in point of security, as compared with the trust-disposition and settlement. (2.) The question naturally occurs, if a sasine from which provisions declared to form real burdens have been omitted, exhausts the precept; and the answer, it is feared, must be in the affirmative. Infeftment, if duly completed by a registered instrument of sasine, creates a fee in the disponee or other party who executes the precept; and the omission of contemplated burdens on the fee makes that infeftment, in a feudal sense, a broader, and not a more limited right than if they had been expressed in the sasine. The remedy to a party who has an interest in money provisions thus declared to be real burdens, but fraudulently omitted from the investiture, is by action against the

disponee for payment, or to have him ordained to grant heritable security. (3.) As infeftment in fee can be given to only one member of a destination at one and the same time, (above, § 74. 4,) the instrument of sasine will be limited to the institute or disponee; or failing him, to the substitute who takes by service.

TITLE III. DEED OF ENTAIL.

251. INTRODUCTORY REMARKS. — 1. *Entails prior to the statute.*—Entails, in the strict sense of the term, are destinations protected by certain clauses called irritant and resolutive, which, if they do not derive their whole effect from statute, appear at least to have with much hesitation been admitted by our common law. It was naturally a principal object with a powerful aristocracy to transmit their estates to a long line of successors, unincumbered with the debts and obligations of the individual heirs into whose possession they should descend; and as liferents in perpetuity are unknown to our law, the end to be attained was an effectual mode of restraining the power of alienation inherent in the right of property. *Inhibition*, which is a mere personal prohibition, and *interdiction*, which strikes at deeds granted without the consent of the judicial advisers of the interdicted, were resorted to without permanent effect: the former is available only when passing upon onerous deeds, which entails, unless mutual, are not considered to be (*a*); and the latter is subject to relaxation at the discretion of the Judge (*b*). They were at best but effectual against the persons interdicted or inhibited, and failed in restraining a series of heirs. At length the ingenuity of the feudal lawyers of the time invented those clauses styled irritant and resolutive, whereby not only were the debts and deeds of the heir in possession rendered null and ineffectual, but his own right declared to be extinguished, or in law language, *resolved*, by his contravening the provisions of the settlement (*c*). Sir Thomas Hope, in reference to these memorable clauses, observes (*d*), " There is a new form found out which has these two branches, viz. " either " to make the party contractor of the debt to incur the loss " and tinsel of his right in favour of the next in tailzie, or

"to declare all deeds done in prejudice of the tailzie by "bond, contract, infeftment or comprising, to be null of the "law." Of their combined effect he proceeds to give some account; and he declares his opinion to be, that except in questions with the Crown or the superior, they were valid declarations, effectual against the heirs as conditions of the grant, and against creditors-comprisers, because they cannot have the right "*nisi cum sua conditione et causa.*".

2. *Statute of* 1685 (*e*).—But notwithstanding the opinion of Hope thus strongly expressed, the effect of the irritant and resolutive clauses of the strict entail was long the subject of doubt and discussion, and it was by a narrow majority of the Judges that it was ultimately supported (*f*). The power of the aristocracy prevented a renewal of the discussion, and procured a statute to be passed, which has proved in its practical operation one of the most stringent ever enacted by the Scottish Parliament. By this act, it is made lawful to tailzie lands and estates, and burden substitute heirs with such conditions as the entailers shall think fit, and to affect the tailzies with irritant and resolutive clauses, so as to restrain the heirs of tailzie from selling, alienating or disposing of the lands, or contracting debt, or doing any other deed by which they may be apprised, adjudged or evicted from the substitutes in the tailzie, or the succession frustrated or interrupted. All such deeds are declared null, and the next heir of tailzie may, upon contravention, take up the estate. The statute requires that the irritant and resolutive clauses shall be inserted in the procuratories of resignation, charters, precepts and instruments of sasine relating to the tailzied lands; and a register is appointed to be kept, wherein shall be recorded the substantial parts of the deed of tailzie. It is farther declared, that the omission to repeat the provisions and irritant clauses in the rights and conveyances of the lands, shall import a contravention against the person guilty of the omission and his heirs, but shall not affect creditors, or other singular successors contracting *in bona fide* with the person infefted in the lands.

(*a*) Hope, Min. Pr. *v. Tailzies*, § 11, *et seq.* See Chapman *v.* Bryson, 22d Jan. 1760, M. 15,511, 5 B. S. 873 and 940.

(*b*) Balfour, *v. Interdiction*, c. 5.

(*c*) They are generally ascribed to Sir Thomas Hope, who is said to have advised the first strict entail, that of the lands of Calderwood. See 3 B. S. 168, 170.

(*d*) Hope's Min. Pr. *v.* Tailzies, § 18.

(*e*) 1685, c. 22. OUR SOVERAINE LORD with advice and consent of his Estates of Parliament STATUTES and DECLARES that it shall be lawful to his Majestie's subjects to tailzie their lands and estates and to substitute heirs in their tailzies with such provisions and conditions as they shall think fit and to affect the saids tailzies with irritant and resolutive clauses whereby it shall not be lawful to the heirs of tailzie to sell annailzie or dispone the saids lands or any part thereof or contract debt or do any other deed whereby the samen may be apprised adjudged or evicted from the others substitute in the tailzie or the succession frustrat or interrupted Declaring all such deeds to be in themselves null and void and that the next heir of tailzie may immediately upon the contravention pursue declarators thereof and serve himself heir to him who died last infeft in the fee and did not contraveen, without necessity anyways to represent the contraveener, It is ALWAYS DECLARED that such tailzies shall only be allowed in which the foresaid irritant and resolutive clauses are insert in the procuratories of resignation, charters precepts and instruments of seasine, and the original tailzie once produced before the Lords of Session judicially who are hereby ordained to interpose their authority thereto and that a record be made in a particular Register-book to be kept for that effect wherein shall be recorded the names of the maker of the tailzie and of the heirs of tailzie and the general designations of the lordships and baronies and the provisions and conditions contained in the tailzie with the foresaid irritant and resolutive clauses subjoined thereto, to remain in the said Register *ad perpetuam rei memoriam* And for which record there shall be paid to the Clerk of Register and his deputes the same dues as is payd for the registration of seasines and which provisions and irritant clauses shall be repeated in all the subsequent conveyances of the said tailzied estate to any of the heirs of tailzie And being so insert his Majesty with advice and consent foresaid DECLARES the samen to be real and effectual not only against the contraveeners and their heirs but also against their creditors comprysers adjudgers and other singular successors whatsoever whether by legal or conventional titles. It is ALWAYS HEREBY DECLARED that if the saids provisions and irritant clauses shall not be repeated in the rights and conveyances whereby any of the heirs of tailzie shall brook or enjoy the tailzied estate the said omission shall import a contravention of the irritant and resolutive clauses against the person and his heirs who shall omit to insert the same whereby the said estate shall *ipso facto* fall, accresce and be devolved to the next heir of tailzie but shall not militat against creditors and other singular successors who shall happen to have contracted *bona fide* with the persons who stood infeft in the said estate without the saids irritant and resolutive clauses in the body of his right. And it is further DECLARED that nothing in this act shall prejudge his Majesty as to confiscations or other fines as the punishment of crimes or his Majesty or any other lawful superior of the casualties of superiority which may arise to them out of the tailzied estate but which fines and casualties shall import no contravention of the irritant clause.

(*f*) Stair, 2. 3. 58; Stormonth, 26th Feb. 1662, M. 13,994.

252. GENERAL STRUCTURE.—(1.) The strict entail is thus a settlement of lands on a particular series of heirs, made permanent by statutory clauses, and not existing independent of statute (*a*). In so much is it the creature of statute, that the ordinary feudal rules are suspended in their application to a tailzied fee, when their operation would bring subjects under the fetters of an entail by implication. Thus, resignation *ad remanentiam*, in the hands of the proprietor of a tailzied superiority, does not consolidate the *dominium utile* with the *dominium directum*, to the effect of bringing the former under the restraining clauses of the entail. The procuratory, under which the resignation is effected, must form a substantive tailzie, and be registered under the statute. Nor is it an exception to this rule that a renunciation or resignation *ad remanentiam* of a redeemable right operates in favour of the heirs of entail: rights in security are mere burdens on the fee, which may be extinguished by renunciation, or even by payment or intromission (*b*). (2.) As respects the destination, the description of the lands and the feudal clauses, reference is made to the disposition of sale, and the special disposition and settlement. (3.) The restraining clauses have generally received a strict interpretation, and ought to be framed with care, but there is no peculiar intricacy in their construction. To prepare a binding deed of entail is a task not of any real difficulty to the conveyancer who prefers the usual and acknowledged style to an untried phraseology of his own; and the observation so often repeated, that litigation in regard to deeds of conveyance is generally caused by a neglect of simple rules, is very applicable to the present subject. It is observed by a learned author (*c*), that there are no *voces signatæ*,—no formal and indispensable words requisite to the efficacy of the irritant and resolutive clauses; but it was the opinion of the majority of the Court, in March 1833 (*d*), that there are certain technical words in general use, some of which are essential in the clauses of limitation. Yet it is nowhere stated with precision what those essential words are. The practical lesson to be derived from this state of uncertainty plainly is, to trust solely to the approved and accustomed forms of style. (4.) Much variety of expression is

employed in designating different branches of the entail. Thus the clauses which in statutory language are called *prohibitions*, are often styled *fetters* and *limitations*, and although these words may be sufficiently descriptive of their nature, it is recommended, in framing deeds of entail, to employ the statutory term *prohibitions*. The terms, *restraints* or *restrictions*, and *restraining clauses*, seem to comprehend all those parts of the deed, (conditions, provisions, prohibitions, irritant and resolutive clauses,) whereby the powers of the members of tailzie, as fiars, are restrained or lessened (*e*).

(*a*) See Lord Meadowbank, in Hamilton, 3d March 1815, F. C.

(*b*) Heron, 27th April 1735, Cr. and St. 1. 198; Galbraith, 14th Jan. 1814, F. C.; Wauchope, 14th Dec. 1815, F. C. See Fairlie, 11th July 1827, S.

(*c*) Bell's Princ. 1732.

(*d*) See opinion of Lords Glenlee and other consulted Judges in Vere, 7th March 1833, F. C., and (5th March) 11 S. 520; affirmed, 14th July 1837, 2 S. and M'L.

(*e*) See Lawrie, 19th June 1744, 5 B. S. 738.

253. RULES OF CONSTRUCTION.—(1.) The rules for construing the restraining clauses in deeds of entail have unfortunately been far from uniform, either as respects the Court of Session or the House of Lords. The ancient rule was that of strict interpretation, as we learn from all our writers. Even Craig (*a*), an admirer of feudal greatness, observes, "*quod licet maxima nobilitatis pars et sentiat et cupiat nostro* "*tamen jure talliæ odiose reputantur et strictissimam interpre-* "*tationem recipiunt*," and yet in his time limitations in their modern strictness were unknown. In like manner, Stair regards tailzies as most unfavourable and inconvenient (*b*); and Erskine describes them as imposing an unfavourable restraint upon property, and becoming frequently a snare to trading people, and therefore as *strictissimi juris* (*c*). The early decisions of the Court, it is true, were not uniformly in accordance with this notion; but the court of last resort, in reversing the judgment in the Duntreath case (*d*), followed the opinion of our institutional writers, and discouraged the practice which had begun to prevail of giving *fair play* to the entail, by applying the rule of probable intention in opposition to that of strict

interpretation. This tendency had scarcely been checked when the Court of Appeal, in their turn, deviated from this rule, by giving a meaning to the word *dispone*, in a large class of cases respecting leases of unusual endurance, which it does not bear in Scotch law language, thereby drawing closer the fetters upon the heir in possession; (below, § 272. 5.) The Court below have, in these circumstances, unavoidably hesitated between the two rules of interpretation, sometimes dealing strictly with the restraining clauses, in other instances giving fair play to the deed; but at length the strict rule seems to be finally adopted (*e*). Examples of the effects produced by the uncertain notions which have prevailed will frequently occur in the course of these observations. (2.) The principle of strict interpretation means, not merely that without direct words limitations cannot be imposed on the members of tailzie from presumed or implied intention; but that, even where there are words within the deed having a certain tendency to indicate the intention of the entailer, they may, under the strict rule of construction, fail of effect either from want of technical precision, or from error in the form and manner in which they are introduced. (3.) Strict construction maintains not merely in questions with third parties, creditors or disponees, but even *inter hæredes*—amongst the persons called to the succession, with relation to those clauses of the deed which impose restraints on the right of property (*f*).

(*a*) Craig, 2. 16. 12.

(*b*) Stair, 2. 3. 58.

(*c*) Ersk. 3. 8. 29.

(*d*) Edmonstone, 24th Nov. 1769, M. 4409.

(*e*) See Speid, 21st Feb. 1837, F. C., 15 D. 618; and note and opinion of Lord Corehouse.

(*f*) See opinion of Lord Glenlee and other consulted Judges in Vere, 7th March 1833, F. C., and (5th March) 11 S. 520; affirmed, 14th July 1837, 2 S. and M'L.

254. FORM OF THE DEED.—(1.) An entail may be in the form of a disposition, unilateral or mutual, or of a procuratory of resignation; or it may be embodied in a marriage-contract. The form of the disposition is probably the best, as warranting immediate infeftment without the necessity of entering with

the superior, which that of the procuratory of resignation implies; and although it is inconsistent with the nature of fees that one should be his own vassal by original constitution, a rule which is illustrated by the practice in creating freehold votes under the old system, there is no feudal incompetency in a party granting warrant for his own infeftment by a holding *a se de superiore suo*, since a precept warranting a public infeftment is validated by the subsequent confirmation of the superior. Nevertheless, the deed of entail, when in the form of a disposition, in practice contains an alternative holding, even where the entailer conveys in his own favour as institute (*a*). (2.) But, in whatever shape it is executed, it is essential to the deed as a strict entail, that it contain proper prohibitive, irritant and resolutive clauses, directed against the disponee or institute, and the series of heirs expressed in the destination, as well as the particular acts which they are forbidden to commit. But there is no fixed rule as to the place or form in which they must stand in the deed. It is not even essential that the clauses should be contained in the entail itself, although, under the statute, they must, in order to render it effectual against creditors and disponees, be inserted in the investitures following on it. An entail may be validly constituted (although such a form is not to be recommended in practice) by declaring that the lands shall be taken and held under all the conditions, and the prohibitory, irritant and resolutive clauses, expressed in an entail of other lands already completed by registration (*b*). In such cases it is necessarily implied, that the clauses in the deed to which reference is made cannot be taken word for word, applicable as they are to other lands, and probably to a different series of heirs. (3.) The statute makes mention of procuratories of resignation, charters, precepts and instruments of sasine. The first and third comprehend all the deeds by which a tailzie may be constituted. Thus, it is common to frame an entail in the simple form of a procuratory of resignation. To that case the statute directly applies; but when the procuratory or precept is contained in the body of a disposition of entail, it is not necessary to repeat the restraining clauses as contained in some other branch of the deed, in either clause. All the

clauses of a deed are understood to be embodied in every other part of the same deed (*c*). Thus, it is not a valid objection to a deed of entail, that the limiting clauses are introduced before the destination, if it be clearly expressed that they shall apply to the whole series of heirs (*d*); and in a charter of resignation following on a procuratory contained in a deed of entail, it is sufficient that the restraining clauses are engrossed in the *quæquidem*, as forming a burden on the resignation, although not even referred to in the dispositive clause. Such a reference, however, it was assumed, would have been essential in the deed of original constitution (*e*).

(*a*) Jurid. Styles, 1. 228, 240.

(*b*) Don, 14th July 1713, M. 15,591; Robertson's Ap. 76; Lawrie *v.* Spalding, 24th July 1764, M. 15,612. See opinion of Lord Glenlee and other consulted Judges in Vere, 7th March 1833, F. C., and (5th March) 11 S. 520; affirmed, 14th July 1837, 2 S. and M'L., correcting Broomfield, 29th June 1784, M. 15,618.

(*c*) See Murray Kynnynmound, 5th July 1744, M. 15,380.

(*d*) Innes, 23d June 1807, M. App. *v. Tailzie*, No. 13; affirmed.

(*e*) Vere, as above.

255. CLAUSES OF THE ENTAIL.—The form most convenient for reference is that of the unilateral disposition. It contains the following clauses, twelve in number, viz. The *narrative; dispositive; obligation to infeft; procuratory of resignation*, in which are usually introduced the conditions, prohibitions, irritant and resolutive clauses, declarations and provisions of the tailzie; *assignation to the writs and rents; obligation to free the heirs of debts; reserved power to alter; dispensation with the delivery; procuratory for registration; clause of registration; precept of sasine, and testing clause.*

256. NARRATIVE (*a*).—(1.) The narrative or introductory clause contains the name and designation of the entailer. When feudally vested with the fee, he will be described as *heritable proprietor*. But it is not essential that his title should be feudalised: it is enough that he have the power of disposal, so as to be enabled to confer a right on the substitutes to obtain a title in a question with the entailer's legal heir, or with trustees; and thus a personal right to lands,

either under a direct conveyance or service as heir, is sufficient; but it seems essential to the application of the fetters, that the settlement be special, and not merely of lands to be acquired (*b*). (2.) It is frequently a question of importance if the title of a party desirous to execute an entail gives him the power of disposal, or of imposing additional restrictions on the right of property. Thus, one who has already, by an onerous deed, settled his estate upon a particular heir or heirs, is tied up from adding to the destination, or fettering the heirs, unless he has reserved a power to that effect. (See *Marriage-Contract.*) The same restraint lies on a proprietor under a conveyance which contains a prohibition against altering the course of succession, (above, § 248,) and consequently on a member of a strict entail other than the last substitute (*c*); (below, § 266. 7.) (3.) An heir in apparency making an entail, but dying before his title is completed, transmits no valid obligation against his heir; but the heir will be bound by the entail at common law, if he should serve to the entailer; and if the entailer had been in possession for three years, the heir will incur obligation under the statute, if he should pass him by, and serve to a remoter ancestor (*d*); (above, § 138. 2.) (4.) This clause recites also the cause of granting or consideration, which is the wish of the entailer to perpetuate his name and family. In a mutual entail the consideration is onerous, viz. the conveyance by each party to the series of heirs chosen by both.

(*a*) I A. heritable proprietor of the lands and others after described for the better preservation of my family and memory and for certain other weighty causes and considerations moving me.

(*b*) Renton, 5th Dec. 1837, D. See Livingstone *v.* Napier, July 1762, 5 B. S. 888; Grant, 25th Jan. 1769, M. 15,422; Stirlings, 15th Dec. 1801, M. 15,455.

(*c*) Menzies, 5th June 1785, M. 15,436; Hailes, 169. See Reay, 25th Nov. 1823, 2 S. 520; affirmed, W. S. 1. 306; Stewart *v.* Porterfield, 24th May 1826, W. S. Ap. 2. 369, and 13th Nov. 1829, F. C., and (18th Nov.) 8 S. 16; affirmed, 23d Sept. 1831, W. S. 5. See Meldrum, 29th June 1827, 5 S. 857.

(*d*) 1695, c. 24, above, p. 206. See Carmichael, 15th Nov. 1810, F. C.

257. DISPOSITIVE CLAUSE (*a*).—This branch of the deed contains the destination framed according to the wish of the

party, (§ 245,) and the lands, under a reference to the conditions, provisions, reservations, and restraining clauses, as expressed in an after part of the deed. (1.) This clause is the ruling clause of the deed, and may be referred to for the purpose of explaining, or even limiting the executive or feudal clauses. Thus, where the dispositive clause was in favour of the entailer's eldest son and the *heirs-male* of his body, but in the procuratory of resignation new infeftment was warranted to the eldest son and *the heirs of his body* generally, the terms of the dispositive clause received effect (*b*). (2.) Under *lands and estates*, in the sense of the statute, are included rights of property only, and not heritable debts, even those secured by adjudication, unless where the right of the adjudger has been feudalised, and the legal is expired, whereby it becomes a good prescriptive title, limited only by the right of redemption in the debtor (*c*). Burgage subjects may be validly entailed (*d*).

(*a*) Have given granted and disponed as I do hereby with and under the conditions provisions prohibitions clauses irritant and resolutive declarations and reservations after specified GIVE GRANT and DISPONE to myself and the heirs-male of my body whom failing *(the substitution)* whom failing to any persons to be named by me in any deed of nomination or other writ to be made and executed by me at any time during my life; and failing of such nomination or of the persons so to be named and their heirs then to my own heirs whomsoever and their assignees the eldest heir-female and the descendants of her body excluding heirs-portioners and succeeding always without division through the whole course of the female succession ALL and WHOLE *(the lands)* with all right title and interest whatsoever which I my predecessors or authors had have or may anywise claim or pretend to the lands and others above disponed or any part thereof: BUT ALWAYS with and under the conditions provisions prohibitions and clauses irritant and resolutive declarations and reservations after written. *Note.*—The above clause is an example of an institution of the entailer himself, which is a frequent form of the entail.

(*b*) Forrester, 11th July 1826, F. C., 4 S. 824.

(*c*) Dalyell, 17th Jan. 1810, F. C.

(*d*) Maclauchlan, 27th Jan. 1768, M. 15,421; Dillon, 14th Jan. 1780, M. 15,432.

258. OBLIGATION TO INFEFT (*a*).—The entailer here binds himself in ordinary form to infeft the institute, (whether the entailer himself or another,) and the heirs of tailzie named and described in the dispositive clause, under a similar reference to the future clauses.

(a) In which LANDS and ESTATE above disponed with the pertinents I BIND and OBLIGE me and my heirs and successors whomsoever without the benefit of discussing them in order to infeft myself and the heirs-male of my body whom failing the other heirs of tailzie above mentioned with and under the conditions provisions prohibitions clauses irritant and resolutive declarations and reservations after specified and that by two several infeftments &c.

259. PROCURATORY OF RESIGNATION (a).—In this clause the destination is usually, although, as regards the validity of the tailzie, not necessarily repeated (b); but, as resignation must proceed, and a charter be framed in the precise terms of the procuratory, (see § 154. 4.) the latter usually contains the full destination. The conditions, provisions and restraining clauses of the deed, likewise, are in practice annexed to the procuratory, as burdening the resignation of the fee into the hands of the superior. The practice in this respect seems to have originated in the old feudal rule, that the consent of the superior was essential both to the constitution and the alteration of a tailzie, and that resignation was the most direct mode of evidencing that consent (c).

(a) And for accomplishing the said infeftment by resignation I hereby constitute and appoint and each of them jointly and severally my lawful and irrevocable procurators GIVING GRANTING and COMMITTING to them full power and warrant for me and in my name to RESIGN &c. *(in usual form)* for new infeftments of the same to be given and granted to myself and the heirs-male of my body whom failing *(substitution repeated)* heritably and irredeemably BUT ALWAYS with and under the conditions prohibitions clauses irritant and resolutive provisions declarations and reservations after written.

(b) See Murray Kynnynmound, 5th July 1744, M. 15,380.

(c) See Craig, 2. 17. 20-1.

260. CONDITIONS OF THE TAILZIE.—Here commences the statutory branch of the deed. The statute permits proprietors to tailzie their lands under such conditions as they shall think fit. Conditions imply certain acts which the persons favoured by the entailer are required to perform, in contradistinction to those which they are forbidden to commit by a future clause containing prohibitions; and they are interpreted according to the fair meaning of the terms (a). The most frequent conditions in the modern entail will be noticed in their order.

(a) More's Notes on Stair, clxxxiv.

261. CONDITION TO BEAR NAME AND ARMS (*a*).—A condition to bear the family name and arms seems to be binding independent of statute (*b*.) Where a distinctive coat of arms has not been already assigned by lawful authority to that particular branch of the family which comprehends the entailer, this condition imports an obligation on the institute, or heir in possession, to follow out the wishes of the entailer, by obtaining from the Lyon arms of the same general character with those expressed in the condition, descendible to the heirs of entail (*c*). The neglect of this condition is hurtful only to the contravener.

(*a*) With and under this condition always as it is hereby expressly provided that my said whole heirs of entail above written shall be bound and obliged constantly to bear use and retain the surname of A. and arms and designation of A. of C. in all time after their succession to or obtaining possession of my said lands and estate as their proper surname arms and designation. *(The word only will be used if it is intended to prevent the heirs from bearing any other name and arms.)*

Note.—It will be observed, that the above clause relates to an institution of the entailer himself. Where another is disponee or institute the condition will be directed against *the said B. and the heirs of entail above written.* The same observation applies to the clauses quoted in some of the future notes.

(*b*) Stevenson, 26th June 1677, M. 15,475.

(*c*) Moir, 5th Feb. 1794, M. 15,537.

262. CONDITIONS TO RECORD, &c. (*a*).—(1.) The conditions to record the entail in the register of entails, and to complete a title under it by infeftment, are steps essential to the right in questions with third parties, the former as being a statutory, and the latter a feudal requisite; but they are not so *inter hæredes*, amongst the members of the tailzie, who are bound by the quality of their own title (*b*). (2.) These conditions embrace the most essential requisites of the tailzie, and ought to be especially in the view of the conveyancer both in the preparation of the deed, and the completion of the right. The necessity of registering the deed on the one hand, and feudalising the right on the other, illustrates, in the clearest manner, the operation of the influences which it is the object of these forms to combine, and thus make subservient to the purposes of the entailer. Until registration the statutory conditions are disregarded, and without infeftment the

feudal rules are not fulfilled. A combination of the statutory and feudal forms is thus required to make the strict entail a perfect right. But this effect, although best illustrated by reference to the essential forms of registration and infeftment, is not produced by these alone. It is manifest that registration, to have any force, must be of a deed framed in the terms of the statute. The clauses must thus be perfect, and duly directed against the parties whom it is intended to restrain. (3.) It does not appear to have been formally decided, that a deed of nomination of heirs executed in virtue of a power reserved by the entailer, must, in order to receive effect, be recorded in the register of tailzies; but it is probable that the terms of the statute would be held to apply to it. The point, it is understood, was indeed so ruled by the Lord Ordinary in the Porterfield case (*c*). There seems a marked distinction between such a deed and the judicial or *quasi* judicial forms by which an heir *nasciturus* takes up the succession after coming into existence. Such heir is described in the destination by technical language, and his place in the tailzie clearly marked out; but a substitute *nominandus* has no legal existence unless under the deed of nomination. (4.) Registration in the books of Council and Session is useful for preservation only.—The following cases will shew the propriety of the substitute heirs exercising their right to enforce these conditions.

1. *Entail registered but not feudalised*—(1.) When the member in possession is heir of the last investiture, he may bring the estate to judicial sale for payment of the entailer's debts (*d*), or the creditors of the heir may attach it by special charge and adjudication (*e*); and as special charge is equivalent to special service, such heir may complete a title clear of the limitations of the entail, and grant a valid conveyance to a purchaser (*f*). But although the heir of the former investiture, neglecting to complete a title, should have possessed on apparency for three years, his debts, (with the exception of those with which the entail gives power to charge the estate, *e. g.* provisions to children) will not affect the estate unless made real by adjudication during his lifetime, and the next heir may complete a title under the entail without in-

curring liability under the statute of 1695 (*g*); for, as creditors would have unquestionably been excluded by a title made up under the entail, they cannot acquire a better position as regards the next heir, by the member in possession disregarding the entail (*h*). (2.) When, on the other hand, the institute, or member succeeding, is not heir of the last investiture, but a stranger, the rule is different. His right being solely grounded on the entail, he cannot sell the estate, nor may his creditors attach it, unless under all the qualifications of the right; their diligence will thus affect no more than the liferent of the member in possession. The rule was first applied to entails in the House of Lords, on the ground that the statute comprehends those entails only on which infeftment has followed (*i*); but it is now established on the general principle which regulates the transmission of personal rights (*k*). (3.) It follows, from the doctrine established by the cases last referred to, that so long as his title continues personal, the member in possession, although heir of the last investiture, cannot, by voluntary deed, alienate or burden the estate (*l*).

2. *Entail feudalised but not recorded.*—(1.) If the entail has been merely feudalised and not also recorded in the register of entails, the conditions of the statute have been disregarded. The member in possession may sell the lands (*m*), or they may be adjudged by creditors (*n*). And it is no bar to the diligence of creditors that the entail is recorded, provided the debts upon which it proceeds were contracted before the registration (*o*), even although decree of irritancy on the ground of contravention has preceded the diligence (*p*). Nor does it appear that future heirs can maintain an action for damages against a member contravening the provisions of an unregistered entail, since the substitutes having themselves the power to enforce the condition, it cannot be neglected without their participation (*q*). (2.) But where the entail is a mutual and onerous deed, it becomes effectual when feudalised, although remaining unrecorded, to exclude creditors whose debts have not been made real before infeftment, if contracted after the date of the entail (*r*).

(*a*) As ALSO with and under this condition that the heirs of entail succeeding to me shall be BOUND and OBLIGED to record these presents in the register of tailzies as also in the books of Council and Session for preservation and also to complete their titles upon these presents by infeftment duly registered in case the same shall not have been done by myself and that within year and day after my decease in case the person so succeeding shall be within the united kingdom at the time and in case he shall be furth thereof then within year and day of his coming thereto without prejudice nevertheless to any of the heirs of entail to apply for recording these presents sooner if they shall think proper.

(*b*) Ersk. 3. 8. 26-7 ; Sandford on Entails, 73, *et seq.*, also 84, *et seq.* ; Willison, 26th Feb. 1724, M. 15,369 ; Hall, Feb. 1726, M. 15,373 ; Macgill, 13th June 1798, M. 15,451. See Carmichael, 15th Nov. 1810, F. C.

(*c*) See Stewart *v.* Porterfield, 13th Nov. 1829, F. C., and (18th Nov.) 8 S. 16.

(*d*) Mitchell, 4th Feb. 1809, F. C.

(*e*) Douglas, 22d Feb. 1765, M. 15,616, B. S. 5. 907 ; Russell, 31st Jan. 1791, M. 10,300, Bell, 166.

(*f*) Kennedy, 11th Feb. 1829, 7 S. 397.

(*g*) 1695, c. 24, above, p. 206.

(*h*) Dickson, 24th Feb. 1801, M. App. *v. Tailzie*, No. 7.

(*i*) Denholm, 5th June 1733, Cr. and St. 1. 113.

(*k*) Creditors of Gordon, 14th Nov. 1749, M. 15,384. See Boyd, 22d Jan. 1766, B. S. 5. 919; Chisholm, 27th Feb. 1800, M. App. *v. Tailzie*, No. 6; Syme, 1st Feb. 1803, M. 15,619.

(*l*) Chisholm, as above.

(*m*) Graham, 11th Dec. 1829, 8 S. 231.

(*n*) Willison, 8th Dec. 1724, M. 15,371.

(*o*) Smollett's Creditors, 14th May 1807, M. App. *v. Tailzie*, No. 12 ; Rose, 11th June 1828, F. C., 6 S. 945 ; affirmed, 30th August 1831, 5 W. S. See Ferrier, 10th Dec. 1813, F. C.

(*p*) Munro Ross, 9th Feb. 1836, F. C., 14 D. 453.

(*q*) Queensberry Executors, 7th March 1828, 6 S. 706, reversed, 16th July 1830, W. S. 4. 254. See opinions of Lords Justice-Clerk, Alloway and Newton.

(*r*) Agnew, 31st July 1822, Shaw's App. 1. 333.

263. CONDITION TO POSSESS UNDER THE ENTAIL (*a*).—The member in possession is required to possess under the entail, and in virtue of no other title, except as strengthening or supporting the entail. To complete a feudal title in fee-simple, therefore, the entail remaining personal, will infer a contravention of the condition. Substitute-heirs have a title to enforce the condition without a special clause to that effect (*b*).

(*a*) AND ALSO with and under this condition always as it is hereby specially provided and declared that the said *(the institute)* and the whole heirs of tailzie above written shall take and possess the lands and estate above disponed upon this

tailzie only and upon no other right or title whatsoever And that they shall use any other right which they may happen to have or acquire as additional and collateral titles thereto for strengthening and supporting this deed of tailzie only and for no other purpose whatever.

(*b*) Maule, 1st March 1782, M. 10,963; Hailes, 899.

264. CONDITION TO INSERT THE CLAUSES IN THE TITLE-DEEDS (*a*).—This is a statutory provision, and consequently obligatory without being expressed; (see p. 336.) It applies as well to deeds made before as since the passing of the Act. In order to affect creditors and other singular successors, the clauses must be inserted, and not merely referred to (*b*). It is usual to add to those deeds enumerated in the statute all special services and retours.

(*a*) As also with and under this condition as it is hereby provided that the said *(the institute)* and the whole heirs of tailzie foresaid shall be obliged to cause ingross and *verbatim* insert the whole foresaid course and order of succession (at least so far as shall be subsequent to the heir in possession for the time) with the several conditions prohibitions clauses irritant and resolutive provisions declarations and reservations in the charters and infeftments to follow hereupon and in all after charters precepts procuratories of resignation special services retours thereof and instruments of sasine of the lands and others above disponed or any part thereof (excepting always the condition with respect to recording these presents which they shall not be obliged to repeat after the same shall have been duly recorded as aforesaid.)

(*b*) Garnock, 28th July 1725, M. 15,596.

265. CONDITION OF DEVOLUTION (*a*).—It is not unusual to provide that a member of the tailzie shall forfeit his right on succeeding to another estate, or to a peerage, and that the lands shall thereupon devolve to the next heir. A condition of this nature is interpreted unfavourably to the member in possession. Thus, the devolution takes effect by his succeeding to the entailed estate, after he has acquired the forbidden succession (*b*). The same rule is followed where it is a peerage (*c*). In these instances there was, however, no room for the question, if the member of tailzie taking first the forbidden succession was entitled to the option which of the two estates he would retain. In a later case, the Court were unanimously of opinion, that as the clause of devolution was, in the circumstances, available to the next heir only under an equitable interpretation of its terms, the member

succeeding, in the first place, to the forbidden estate, was on his part entitled to the equity of renouncing that estate, and taking under the entail (*d*). To exclude this equitable construction, a special provision may be introduced to the effect, that the member of tailzie taking up the forbidden succession, whether before or after succeeding under the entail, shall thereby forfeit all right to the entailed estate.

(*a*) See clauses below.

(*b*) Lockhart, 25th Nov. 1755, M. 15,404. The condition was in these terms: "It is hereby expressly provided and declared that whensoever the "said Charles Gilmour or the heirs above mentioned succeeding to and pos- "sessing my estate shall also succeed to the estate now belonging to the said "Sir Alexander Gilmour then and from thenceforth the right of my estate in "their favours shall cease and be extinct void and null and the same shall fall "and pertain to the next heirs of tailzie appointed to succeed to whom it shall "be lawful to procure themselves served retoured infeft and seised in my estate "as heirs of tailzie to the person who was last infeft before the person thus suc- "ceeding to Sir Alexander Gilmour's estate or to obtain adjudication declara- "tor or any other method of the law as aforesaid." Bruce Henderson, 20th Jan. 1790, M. 4215. The clause was in these words: "In case any of the "heirs of tailzie shall happen to succeed to and be in possession of the estate of "Fordel then the said heir shall be obliged to make up titles to the lands of "Earlshall and convey the same to his second son &c. whereby the two estates "may be enjoyed by two separate and distinct persons and the said lands of "Earlshall not be absorbed in the estate of Fordel."

(*c*) Fleming, 19th Jan. 1804, M. 15,559. The clause was in these terms: "And farther providing in case it shall happen any of the heirs of tailzie above "mentioned other than the heirs-male of my body or of the body of the said "Mr Charles Fleming to succeed to the title and dignity of peerage then and in "that case and how soon the person so succeeding or having right to succeed to "my said estate shall also succeed or have right to succeed to the said title or "dignity of peerage they shall be bound and obliged to denude themselves of "all right title or interest which may be competent to them of my said estate "and the same shall from thenceforth *ipso facto* accrue and devolve upon my "next heir of tailzie for the time being sicklike as if the person so succeeding "were naturally dead."

(*d*) Stirling, 16th Jan. 1834, F. C., 12 S. 296.

266. AGAINST WHOM ARE THE CONDITIONS, &C. EFFECTUAL?—1. *Heirs and substitutes how interpreted.*—The statute in words imposes the conditions, provisions and restraints or fetters upon the *heirs and substitutes* of tailzie only. This mode of expression may have arisen from the loose construction bestowed upon these terms at that early period, when the distinctive meaning now attached to the word *institute* had

not come prominently into view. Or it may have been a result of the general practice of conveyancers to make the entailer the disponee (*a*), whereby his successors were necessarily heirs and substitutes of tailzie. But it has never been seriously disputed that the disponee or institute, or first person called as fiar, may be effectually restrained.

2. *The entailer.*—A party cannot tie up his estate from the diligence of his creditors by imposing gratuitous fetters upon himself (*b*), although he may do so for onerous causes, *e. g.* in a marriage-contract, or by means of a mutual entail (*c*). The maker of the entail is thus in the ordinary case an unlimited fiar, even when, by the tenor of the deed, he is a party restrained.

3. *The institute.*—(1.) The disponee or institute in a tailzie is the person, whether named or unborn, to whom the fee is in the first instance directly given. The simplest example of an institution and substitution consists in a conveyance to A., whom failing, to B. But in general the question, who is institute, is resolved by ascertaining to whom the character of first fiar or disponee belongs. Thus, in a destination by a father *to himself, and to A., his only lawful son, and the heirs-male of his body*, the father continues fiar, and is consequently the institute in the tailzie (*d*). (2.) It follows that a bare liferent, whether reserved to the entailer or granted in favour of another, cannot alter the character of the first disponee (*e*). (3.) As entails are generally executed in favour of a *nominatim* institute, questions can seldom arise in regard to the character of an heir unborn, unless under destinations in marriage settlements. But it is thought that a conveyance to a parent in liferent, (not limited by the taxative word *allenarly*,) and to the heir of the marriage in fee, whereby the father is undoubted fiar, would confer the character of a substitute and not of institute on such heir. (4.) Where again the terms are such as to constitute a fiduciary fee in the parent, *e. g. to the father in liferent for his liferent use allenarly, and the heir of the marriage in fee*, the Court seemed in one instance (*f*) to indicate an opinion in favour of the notion, that the first person called to succeed being unborn, and a fiduciary fee existing in the liferenter, the latter was to be regard-

ed as institute. But in a recent case they held unanimously, that under a destination to *A. in liferent, for her liferent use only, and to the second son to be procreated of her body, and the heirs-male of his body, whom failing, &c.* the fee vested in the second son on his coming into existence, as institute, and that his character as such was not affected by his completing a title by service. That step, although employed to declare his title, was not essential to transmit the right (*g*). (5.) Where a conditional institution has been made, (above, § 245. 2.) the person taking the fee on the condition being purified is necessarily the institute (*h*); but as the *status* of institute is personal to one expressly called as disponee, and in whom the right vested, a substitute heir, although he may come first to the succession by the decease before the entailer of one to whom the fee was *nominatim* destined, does not thereby acquire the character of institute (*i*). (6.) But where a conveyance is made by *A. to the heirs of his body, whom failing, to B.*, another form of a conditional institution, (above, § 245. 2.) it has not been expressly decided whether B., on the death of the granter without heirs of his body, is, in technical language, the institute or an heir of entail (*k*).

4. *Heirs or substitutes.*—The character of heir or substitute of entail, as a party on whom the fetters are imposed, is borne by every successor in the right, after the institute, who is included in the terms of the destination, with the exception of the last person called to the succession, heirs-portioners and heirs whomsoever.

5. *Heirs-portioners.*—Where females are called to the succession, heirs-portioners are usually excluded in destinations by such terms as, *the eldest heir-female and the heirs of her body excluding heirs-portioners, and succeeding always without division.* The nature and purpose of a tailzie being to preserve the estate as one subject in the person of the member in possession, and the clauses of the deed being plainly inapplicable to a number of heirs, the devolution of the succession by the operation of the law upon more than one person necessarily evacuates the entail. This result has uniformly been assumed (*l*), but it does not follow that the non-exclusion of heirs-portioners in a succession which embraces

heirs-female will of itself void the tailzie. Tailzies are not necessarily evacuated by containing within themselves the elements of their extinction, but are effectual so far and so long as they apply to the members, as sole proprietors, in the order of the destination; and although the fetters will necessarily fly off when the estate descends by the operation of the law to more than one individual, they continue binding whilst the destination supplies an heir who has or may have a successor entitled as a proper substitute to enforce their operation (*m*).

6. *Heirs whomsoever.*—After the last member of the destination the entailer usually calls to the succession his own heirs whomsoever, or those of the last substitute. Originally it would appear that a destination to heirs-male of the body, called a male fee, was understood by the term *feudum talliatum* (*n*), in contradistinction to *feudum simplex*, which descends to heirs whomsoever. We learn also from Craig, *deficientibus hæredibus in tallia contentis feudum ad dominum redire, etiamsi de hoc nulla fuit mentio;* and afterwards when the Crown came in the place of the superior, it was not as *dominus*, but as *ultimus hæres*, upon the failure of a destination to heirs-male, to the exclusion of heirs whomsoever (*o*). Thus, although Craig's definition of a tailzie is too limited for modern notions, it indicates the origin of the term *heirs whomsoever*, as employed in the close of a destination. For as tailzies were thus at first limited to male succession (*p*), the destination was made to terminate on the *heirs-male whomsoever* of the maker, or of the last substitute, in order to exclude the superior (*q*), and that term naturally changed into heirs whomsoever, when it was no longer usual entirely to debar the succession of females. The term heirs whomsoever became thus a mere expression of style to denote a fee-simple in the person of the heir of line, after the failure of the substitutes in the tailzie, so as to exclude the fisk, and was not construed as adding a branch to the destination (*r*). This interpretation was followed in a case decided soon after the enactment of the statute, in which it was found that a tailzied fee becomes simple, when it terminates on the heirs and assignees of the granter (*s*).

7. *Last substitute.*—A consequence of the fetters

being inoperative against heirs whomsoever, is the freedom of the last substitute in the tailzie. As the heir whomsoever of the granter or of the last substitute is not an heir of tailzie, and thus not a creditor in the conditions of the entail, in which character only is it competent to complain of an act of contravention, he has no title to pursue declarators of forfeiture against the last substitute, who may thus with impunity sell or burden the estate, or gratuitously dispose of it at pleasure (*t*). As the same principle applies to any member of the destination against whom the limitations cannot be enforced, the institute, on the predecease of all the substitutes, may in like manner exercise the powers of a fee-simple proprietor (*u*).

(*a*) Dallas, 559-60.

(*b*) Ersk. 3. 8. 24.

(*c*) Ersk. as above; Bell's Princ. 1747.

(*d*) Gordon, 23d Feb. 1791, M. 15,465. See Livingstone, 3d March 1762, M. 15,418.

(*e*) Wellwood, 23d Feb. 1791, M. 15,463; M. of Titchfield, 22d May 1798, M. 15,467, affirmed; Miller, 12th Feb. 1799, M. 15,471.

(*f*) Wellwood, as above.

(*g*) Logan, 20th Dec. 1836, F. C., 15 D. 291, (under appeal.)

(*h*) Ersk. 3. 8. 44; Bell's Princ. 1746.

(*i*) Mackenzie, 24th Nov. 1818, F. C.; affirmed, Shaw's App. 1. 150. Here the deed contained a clause dispensing with the delivery.

(*k*) See Glen *v.* Peacock, 15th Feb. 1821, Sandford on Entails, p. 149. This case seems to be the same with that of Peacock *v.* Glen, 22d June 1826, F. C., 4 S. 742.

(*l*) Ersk. 3. 8. 32; Mure, 6th Feb. 1823, n. r., noticed in Mure below; E. March *v.* Kennedy, 27th Feb. 1760, M. 15,412; Sprot, 22d May 1828, F. C., 6 S. 833; Hunter, 11th Dec. 1834, F. C., 13 S. 185.

(*m*) Mure, 16th Feb. 1837, F. C., 15 D. 581; affirmed, June 1838.

(*n*) Craig, 2. 16. 3 and 19. See Ersk. 3. 8. 21.

(*o*) Somervell, 25th July 1688, M. 2949.

(*p*) Craig, as above; Balfour, *voce Brieves*, c. 9.

(*q*) Craig, 2. 16. 19.

(*r*) Stair, 2. 3. 43; Ersk. 3. 8. 32; Lord Corehouse in Mure, as in (*m*).

(*s*) Leslie, 15th Dec. 1710, M. 15,358; E. March, 27th Feb. 1760, M. 15,412.

(*t*) Ersk. 3. 8. 32. See Denham, B. S. 5. 623; E. March, as above.

(*u*) Henry, 13th June 1832, F. C., 10 S. 644.

267. TERMS DESCRIPTIVE OF THE INSTITUTE.—In imposing the conditions, provisions and fetters of the entail upon the persons called in the destination, the ambiguity of expression which has occasioned so much litigation has generally arisen

from the use of descriptive words not sufficiently comprehensive. (1.) In an early instance, the distinction between the terms *institute and heir* was disregarded, the intention of the entailer to fetter the institute being manifest from the terms of the entail (*a*); but the strict rule of interpretation led afterwards to a different result. (2.) Thus in an entail where the destination was in favour of *the granter's second son, and the heirs whatsoever of his body, whom failing, &c.*, and the restraining clauses were directed simply against the *heirs of tailzie and provision*, the Court, disregarding the argument from probable intention, held that the son as disponee, and therefore not comprehended within the term heirs, was unlimited fiar of the estate (*b*). In a later case, the intention of the entailer received effect. The institute or disponee was described as an heir, which left no doubt as to the purpose of the entailer; but the decision was reversed on appeal, on the special ground, that "the appellant being fiar or disponee and not an heir of entail, ought not, by implication from other parts of the deed of entail, to be construed within the prohibitory, irritant and resolutive clauses laid only upon the heirs of tailzie" (*c*). (3.) The rigid rule of interpretation being thus sanctioned by the authority of the Court of last resort, the result in future cases came therefore to depend on one of two questions, whether the party maintaining his freedom from the fetters was truly the institute or disponee; or whether, being the institute, the terms employed in the restraining clauses with reference to the members of the tailzie, did or did not comprehend him in that character. The former question has occurred in a numerous class of cases, and the Court, in judging of the distinction between an institute and an heir, have uniformly disregarded relationship, as well as the mere form of the deed, and held that party to be the disponee or institute to whom the estate is first destined in fee, whether he be the heir of line of the entailer or a stranger, and whether the tailzie be constituted in the strict form of a disposition, or in that of a procuratory of resignation (*d*); (above, § 254.) (4.) With respect to the terms proper for describing the institute, the circumstances have in different instances necessarily varied. Thus the terms, *heirs and*

members of tailzie, were held not to comprehend the institute, who in one clause was put in opposition to heirs and members (*e*). And it has in recent cases been uniformly held, that the clearest indication of an intention to fetter the person who is the undoubted institute or disponee, but expressed so as to refer to him as an heir of tailzie, is not enough to bring him within the scope of the restraining clauses (*f*). But as it is only necessary to employ terms sufficiently comprehensive, the words, *person or persons heirs of tailzie foresaid*, used with reference to the institute and substitutes, as contained in prior clauses of the deed, were construed to embrace both (*g*); and a similar interpretation was given to the words *heir or person so contravening*, occurring in the resolutive clause, with reference to prior clauses wherein the institute was named (*h*). Thus also the term, *heir-male of the granter's body*, used in relation to his eldest son as the institute, has, although followed by the words, *other heirs of tailzie*, received its proper and technical application to the *eldest son*; but such interpretation has not been given to the general expression, *heirs of the body* (*i*).

(*a*) Willison, 26th Feb. 1726, M. 15,458.

(*b*) Erskines, 14th Feb. 1758, M. 4406.

(*c*) Edmonstone, *(Duntreath case,)* 24th Nov. 1769, M. 4409; as reversed, 15th April 1771.

(*d*) See Balfour, *v. Warrandice*, c. 27.

(*e*) Steele, 12th May 1814, F. C.; affirmed, Dow, 5. 72.

(*f*) Morehead, 2d July 1833, F. C., 11 S. 863, as reversed, 31st March 1835, 1 S. and M'L. 29; Elibank, 2d July 1833, F. C., 11 S. 858; affirmed, 19th March 1835, 1 S. and M'L. 1; Brown, 11th March 1837, F. C., 15 D. 837; affirmed, Jan. 1838.

(*g*) Syme, 27th Feb. 1799, M. 15,473.

(*h*) Douglas, 14th Nov. 1823, F. C., 2 S. 487; affirmed, W. S. 1. 323. See Bauch, 14th Jan. 1834, F. C., 12 S. 279; Buchanan, 25th Jan. 1838, 16 D. 358, and note to Lord Cuninghame's interlocutor.

(*i*) See Bauch, as above, and opinion of consulted Judges, in Brown, as above.

268. TERMS DESCRIPTIVE OF THE HEIRS.—The clauses of the entail must, in distinct terms, be directed against the heirs or substitutes. But few questions have occurred in reference to the description of the heirs, who, as forming the leading branch of the destination, are necessarily in the view of the

framer of the deed. (1.) A difficulty may sometimes, however, arise, from the inaccurate use of terms descriptive of the species of heirs intended to be fettered. Thus, where an estate was destined by the entailer, (failing a prior series of heirs,) *to his grand-daughter A., and the heirs-male to be lawfully procreated of her body, whom failing, the heirs-female to be procreate of her body*, &c., and the prohibition to alienate was directed against the heirs in this latter branch of the destination, as the heirs-female of the maker of the entail, the heir-male of A. succeeding under the express destination to her heirs-male, was held not to be comprehended under the general term heirs-female as used in the prohibitory clause, notwithstanding that he was, in technical language, an heir-female (*a*). (2.) The character impressed by the deed cannot be affected by the form in which an heir completes his title. Thus, a member of tailzie described as an heir, taking the estate as a judicial disponee under an adjudication in implement of a decree obtained for enforcing a clause of devolution in his favour, does not thereby lose the character of heir or substitute, so as to be entitled to maintain that the fetters do not apply to him (*b*). Nor does an entry by declarator, in place of service, alter the status of an heir (*c*).

(*a*) Dalzell, 30th May 1809, F. C.
(*b*) Henderson, 12th Nov. 1796, M. 15,442.
(*c*) See Mackenzie, 24th Nov. 1818, F. C.

269. PRACTICAL RULES.—The rules deducible from the cases noticed in § 267-8, seem to be these: (1.) In directing the conditions and the other clauses of the deed against the institute and heirs of tailzie, caution must be used in framing a general description. Thus, the *whole persons*, or *heirs and persons*, or *any of the persons foresaid, or my said disponee and the heirs of tailzie foresaid*, appear to have been held sufficiently comprehensive. (2.) In practice, it is more usual to repeat the name of the institute, when he is in existence, followed by the words, and *the heirs of tailzie foresaid*, (not of course the *other* heirs,) at the commencement of each of the clauses which come after the destination. Where, again, the institute is unborn, the most correct form of expression

seems to be, *the said heir-male of my body*, (or other words distinctly descriptive of the institute,) *and the heirs of tailzie foresaid.* (3.) If the entail is mutual or for onerous causes, the fetters may be imposed on the entailer. (4.) As there is no form of words by which heirs-portioners can be subjected to the fetters of the entail, it is proper, when female succession is not excluded, to declare in the destination that the eldest heir-female shall, in all cases, succeed without division (*a*). These rules, and the observations on which they are founded, manifestly apply not only to the conditions, but to the provisions and restraining clauses of the deed. It will therefore be unnecessary again to refer to the mode of describing the *persons* whom it is intended to fetter.

(*a*) See note (*a*), p. 343.

270. PROHIBITIONS.—(1.) The prohibitory clauses of the entail form the substantial part of the deed, the purpose of which, in other respects, is chiefly to make these effectual. They are also styled *limitations*, *restrictions*, or *fetters*; and although these terms are employed in the plural number, they have but a single object—to preserve the succession in the family or line of descendants to whom the estate is destined. The purpose of the maker of a tailzie is simply to protect the destination; and with that view, he prohibits any alteration of the order of succession,—an alteration which may be produced in three several modes,—by gratuitous destination or settlement, by direct and onerous conveyance, or by indirect alienation by the diligence of the law. The prohibitions are therefore specially directed against, *first*, Any alteration of the tailzie; *secondly*, Selling or disposing for onerous considerations; and, *thirdly*, Contracting debt which shall affect the lands; but subject to these limitations, or such of them as may effectually be imposed, each person called to the succession is uncontrolled fiar. These modes of taking heritage out of a particular line of succession, viz. destination, alienation and adjudication, being separate and distinct in form, it arises from the presumption in favour of the free transmissibility of feudal rights, that the omission of any one of them infers the absence of intention on the part of the entailer to exclude that particular

form of alteration. (2.) Of the structure of the prohibitive clause it may be observed, that a limitation, to be binding, must be expressed, and will not be inferred by implication from another part of the clause. Thus, a prohibition to sell does not import a prohibition against contracting debt, nor is either embraced by a prohibition to alter the order of succession (*a*). (3.) The omission of part of the ordinary prohibitions does not directly invalidate the entail, which is binding in so far as these extend; but, even in questions among the members of tailzie, a prohibition against altering the destination is no ground for inhibition or interdict, where alienation or the contraction of debt is not expressly debarred (*b*). (4.) An act which is specially prohibited cannot, however, be performed under a power which is reserved or not excluded; *e.g.* a collusive sale or an adjudication for a fictitious debt (although debts and deeds are not prohibited) will not enable the member in possession by collusive arrangement with the pretended purchaser or creditor, to effect an alteration of the line of succession (*c*). (5.) But the omission to prohibit the contracting of debt will enable the member in possession effectually to warrant a *bona fide* deed, (*e. g.* a tack of an endurance beyond the ordinary period,) so as to exclude any interest on the part of succeeding heirs to reduce the transaction (*d*). (6.) A prohibitive clause in the most perfect form is still a mere branch of the entail. Without the protection of the statutory irritancies it has but a very limited effect, and it has even been doubted if it should receive the interpretation which prohibitory clauses have usually borne in deeds of settlement; (above, § 248.) It seems indeed to be assumed, that the terms gratuitous alienation or alteration apply only to *mortis causa* deeds which remain in the granter's possession, and not to absolute conveyances intended to have immediate effect, although granted without any onerous consideration (*e*).

(*a*) Ersk. 3. 8. 29; Scott Nisbet, Nov. 1763, M. 15,516, affirmed; Stewart, 8th July 1789, M. 15,535.

(*b*) Ersk. as above; More's Notes on Stair, clxxvi. and cases cited; Cathcart, 12th Feb. 1830, F. C., 8 S. 497; affirmed, 18th July 1831, 5 W. S.

(*c*) Cathcart, as above. See Syme, 3d March 1821, F. C.

(*d*) Oliphant, 1st July 1830, F. C., 8 S. 985.

(e) See notes to Lord Cuninghame's judgments in Campbell, 22d Dec. 1837, (Scottish Jurist,) and Buchanan, 25th Jan. 1838, 16 D. 358, and auth. cit.

271. PROHIBITION TO ALTER (a).—(1.) In framing the limitation against altering or infringing the course of succession, although it is advisable to adhere closely to the usual style, it is not essential to employ any particular form of expression, so that the meaning be clear. (2.) Thus a prohibition against doing any thing *in hurt and prejudice of these presents and of the foresaid tailzie and succession* (b); *or any deed whereby the hopes of succession of the succeeding members thereto may be in any measure evaded* (c); *or any other fact or deed in prejudice of the said tailzie, and of the persons above named, and their foresaids*, introduced immediately after the prohibitions against selling and contracting debt; or *selling or contracting debt, or doing any other deed whereby the lands may be any ways affected* (d), has been sustained as effectual. These expressions obviously embrace gratuitous alterations only. (3.) On the other hand, when the acts prohibited relate merely to the defeat of the destination by the diligence of the law (e); or by a sale (f); or by both or either of these means (g); the heir in possession may alter the course of succession by voluntary conveyance; and that although another clause of the entail should bear express reference to a prohibition against any such alteration as contained in the deed (h). (4.) The only exception to this prohibition usual in practice, is expressed in the Style-book (i), and is introduced to prevent questions arising out of the forfeiture of a particular heir; but it is competent to restrict the present or any other limitation to a particular heir or heirs (k). (5.) It is not necessary that the members of tailzie should be restrained from adding to, as well as altering the order of succession. Such a power is excluded at common law by the member assuming possession of the lands, under the conditions of the deed (l). The want of this prohibition seems to leave the members of the tailzie at full liberty to make a new entail, containing additional restrictions (m); and it has been maintained that the creditors of a member of tailzie not affected by the prohibition, may adjudge the estate, or at least their debtor's faculty to alter the succession (n).

(*a*) And with and under the PROHIBITIONS under written viz. with and under this prohibition and restriction that it shall be nowise lawful to nor in the power of *(the institute)* or any of the heirs or substitutes of tailzie above written to innovate alter or infringe this present tailzie or the order of succession hereby established or to do or grant any act or deed that may infer any alteration innovation or change of the same directly or indirectly.

(*b*) Innes, 23d June 1807, M. App. *Tailzie*, No. 13; affirmed.

(*c*) Maclaine, 23d June 1807, M. App. *Tailzie*, No. 14.

(*d*) Ure, 17th July 1756, M. 4315; Rowe, 9th Feb. 1837, F. C., 15 D. 500. See also Campbell, 22d Dec. 1837, (Scottish Jurist,) relative to the same entail, and note to Lord Cuninghame's interlocutor.

(*e*) Brown, 25th May 1808, M. App. *Tailzie*, No. 19.

(*f*) Stewart, 8th July 1789, M. 15,535.

(*g*) Henderson, 21st Nov. 1815, F. C.; Oliphant, 7th June 1816, F. C.

(*h*) Tytler *v.* Grant, 9th March 1826, F. C., 4 S. 541, and case of Dickson, referred to.

(*i*) Jurid. Styles, 1. 228.

(*k*) It is hereby declared that the foresaid conditions prohibitions clauses irritant and resolutive provisions and declarations *(or such of them as it may please the entailer to express)* are for certain weighty causes and considerations to be binding upon and affect the said B. alone but are not to affect any of the other heirs of tailzie above mentioned; (see E. of Fife, as below.)—The same object will be attained by specifying the members of tailzie whom it is intended to restrain, and omitting the other heirs and substitutes.

(*l*) Menzies, 25th June 1785, M. 15,436; Meldrum, 29th June 1827, 5 S. 857; E. of Fife, 7th March 1828, F. C., 6 S. 698; Bell's Princ. 1761.

(*m*) More's Notes on Stair, clxxx.

(*n*) See Brown, 11th March 1837, 15 D. 837.

272. PROHIBITION TO ALIENATE.—1. *Terms.*—This limitation is usually expressed as in the notes (*a*). As respects the persons restrained, the rules above noticed apply; (§ 267-9.) (1.) This prohibition, although directed against acts which, in ultimate effect, produce an alteration of the order of succession, is not inferred from words which plainly import only a change of the destination. Thus, a prohibition *to alter, innovate or infringe the foresaid tailzie, or the order of succession therein appointed, or the nature or quality thereof any manner of way* (*b*); or, *to do any facts or deeds in prejudice of the other heirs, their right of succession* (*c*), does not restrain the heir in possession from selling the lands. (2.) But as it is enough to employ terms which mark the purpose of the entailer, a prohibition *to squander or put away the estate, or any part thereof, vel faciendo vel delinquendo, any ways contrary to this present settlement*, has been held effec-

tual (*d*). Thus also the terms, *annailzie and dispone*, or simply *dispone*, include disposal by sale (*e*).

2. *Absolute conveyances.* — Conveyances for onerous considerations, for the purpose of absolute transmission, are obviously included under the prohibition.

3. *Feu-rights.*—It has been assumed in numerous instances, that grants in the shape of feu-rights, even for an adequate feu-duty, are alienations in the sense of the statute (*f*). In practice, the understanding is uniformly acted on.

4. *Provisions to widows.*—(1.) These, in so far as they exceed the widow's legal right of terce, fall within the scope of the prohibition (*g*). (2.) The terce itself may be excluded by express words, for, although a legal and not a conventional provision, as it is measured by the husband's sasine, the terce cannot be due where that sasine excludes it. The right of terce is indeed weaker than an heritable security, to which it is postponed, and that burden does not affect a strictly entailed estate. Were the terce, therefore, incapable of being excluded, the anomalous result would follow, that the widow of an entailed proprietor would be better secured in her legal rights than the widow of an unlimited fiar. Terce and courtesy are analogous rights: they are merely a legal distribution of the estate, and may be excluded by the style of an entail (*h*).

5. *Leases.*—Under the prohibition *to sell, alienate, dispone, burden, dilapidate, or put away*, are included leases of an unusual endurance (*i*). The terms *dispone, alienate and put away*, as used in deeds of entail, have, after much discussion, been held synonymous. The term alienate was at one period considered to have a more comprehensive application than dispone, and in common acceptation the difference is well marked. The Court, therefore, gave effect to the former as embracing leases of unusual duration, but refused it to the latter (*k*); but in the House of Lords, alienate and dispone were regarded as equivalent terms (*l*). The term, *away put*, was taken in a broader sense than even alienate before the reversal in Elliot's and other cases (*m*).

6. *Term of endurance.* — (1.) Leases of an unusual endurance have uniformly been regarded as alienations; but

the Court have not determined the precise question, what is the proper term of an agricultural lease (*n*). It has been observed, that the term of a lease of this nature may vary according to the custom of different districts, as influenced by circumstances (*o*). (2.) In an early case it was maintained, that a lease for even nineteen years was an alienation, and that a member of tailzie could not set tacks to endure beyond his own lifetime. But in one branch of the Queensberry cases, a lease granted for twenty-nine, twenty-seven, twenty-five, twenty-one or nineteen years, "whichever of the said "several term of years, (short of the period of thirty-one "years,) the Court of Session or House of Lords shall find "to be the longest period" for which the heir in possession had power to grant a lease, was sustained for the term of twenty-one years (*p*). That period may therefore, perhaps, be regarded as the *maximum* of an agricultural lease, contradistinguished from an alienation. (3.) Leases in direct contravention of the tailzie are not valid even for the ordinary period of an agricultural lease (*q*); but where the term of endurance is within the power of the member in possession, for example, nineteen years, it does not invalidate the lease that there is an obligation to renew annually during his lifetime (*r*).

7. *Grassum.*—(1.) Leases even of ordinary duration, when a fine or grassum (which is regarded as anticipated rent) has been accepted for a reduction of the rent, and generally all leases granted *in fraudem* of the entail, fall under the prohibition to alienate. (2.) In construing a clause prohibiting alienation, but permiting leases *without diminution of the rental, at least at the just avail for the time*, it is held that these last words mean a fair value at the time of leasing; that *rental* and *rent* occurring in such a lease are equivalent terms; that an heir in possession taking a grassum effects a diminution of the rental or rent, and does not take the just avail for the time; that a lease granted at the old rent, on a renunciation of a former lease, which rent had been fixed with reference to a grassum, is a lease with diminution of the rental; and that a lease is exceptionable in which the rent payable during the granter's lifetime, or for a certain period from its date, is greater than the rent stipulated for the remainder of the

lease (*s*). (3.) A prohibition to alienate is controlled by a clause permissive of leasing, to the extent of the permission; and in the absence of such a prohibition leases may be granted for grassums, and without limit in respect of endurance (*t*).

8. *Leases of coal, mansion-house, &c.*—(1.) The proper term of endurance of leases of coal, and other mines and minerals, and of fishings, has not been determined. (2.) A lease of the mansion-house, gardens and pleasure ground around the house, (which are not entered in the rent roll of an estate, or in use to be let,) cannot be granted to the prejudice of future heirs (*u*).

9. *Cutting wood.*— When it is intended that the member in possession shall have power to cut wood only to a limited extent, the amount of the privilege ought to be carefully defined. The prohibition to alienate or dilapidate does not include the cutting down of full-grown wood, and a future heir cannot in the general case interfere with the operations of the member in possession, although he should offer the full value of the timber which it is proposed to cut down (*v*). But the Court will exercise an equitable control when the evident purpose or tendency of these operations is to dilapidate the estate by cutting young and unripe wood, or timber necessary for the comfort and amenity of the mansion-house (*w*).

10. *Thirlage.*—This limitation strikes against thirlage of any part of the lands to a mill not belonging to the entailed estate (*x*).

11. *Propelling the succession.*—It is not an alienation to convey the estate to the next heir of tailzie, being the heir *alioqui successurus, (the heir-apparent,* not the *heir-presumptive,)* which is called propelling the succession; nor is the course of succession thereby changed. It cannot, therefore, be excepted to as an act of contravention (*y*).

(*a*) And with and under this prohibition and restriction also that it shall not be lawful to nor in the power of my said disponee or any of the heirs of tailzie foresaid to sell alienate dispone burden dilapidate or put away the lands and others above written or any part thereof either irredeemably or under reversion or to contract debts grant bonds or any other writs deeds or securities or to do any act civil or criminal that shall be the ground of any adjudication eviction or forfeiture of the same or any part thereof or anywise to affect or burden the same nor shall the said lands and estate or any part thereof be affectable by or sub-

ject to any terces or courtesies to the wives or husbands of the persons above written.

(*b*) Campbell, 17th June 1746, M. 15,505. See also Sinclair, 8th Nov. 1749, M. 15,382.

(*c*) Nisbet, Nov. 1763, M. 15,516; affirmed, 20th March 1765.

(*d*) Cuming, 29th July 1761, M. 15,513.

(*e*) Hepburn's Creditors, 8th Feb. 1758, M. 15,507; Elliott, 19th May 1803, M. 15,542.

(*f*) See Cathcart, as in (*u*); Ker *v.* Innes, 23d Jan. 1807, M. App. *Tailzie*, No. 18; affirmed, Dow, 2. 149; M. of Abercorn, 26th Jan. 1816, F. C.

(*g*) Ersk. 3. 8. 30; Bell's Princ. 1751.

(*h*) Bell's Princ. as above; Gibson, 24th Nov. 1795, M. 15,869. The clause is in these terms: "Which liferent locality so to be provided to wives is hereby "declared to be in full satisfaction to them of all they can ask or claim of the "law in name of terce declaring that although it shall happen any of the heirs "of tailzie above specified to fail in providing their wives conform to the above-"written reservations to that effect yet the said wives shall have no manner of "right to the terce or any other legal provision upon or out of the said lands "and estate notwithstanding any law or practice to the contrary."—Macgill, 13th June 1798, M. 15,451.

(*i*) See Craig, 3. 3. 22; Stair, 2. 11. 13; Bell's Princ. 1752; Hunter's Landlord and Tenant, 74, 79.

(*k*) Elliott, 10th March 1814, F. C.; Hamilton, 3d March 1815, F. C. See Stirling, 20th Feb. 1821, F. C.

(*l*) Queensberry Leases, 30th March 1819, 1 Bligh, 339; Elliott, as reversed, 14th March 1821, 1 S. (Ap.) 16, 89.

(*m*) Innes *v.* Mordaunt, 9th March 1819, F. C.; affirmed, 5th July 1822, 1 Shaw, (Ap.) 169.

(*n*) Hunter's Landlord and Tenant, 79, *et seq.* and auth. cit.; Bell's Princ. 1752. See Malcolm, 17th Nov. 1807, M. App. *Tailzie*, No. 17; affirmed, Dow, 2; Turner, 17th Nov. 1807, *ib.* No. 16; affirmed, 1 Dow, 423; Henderson, 18th May 1814, 2 Dow, 285; Queensberry Leases, 30th March 1819, Bligh, 1. 339.

(*o*) See More's Notes on Stair, clxxxv.

(*p*) Wemyss, 12th June 1822, F. C., 1 S. 483. See Bell's Princ. 1752.

(*q*) Gordon, 22d Nov. 1822, 2 S. 32; Malcolm, 19th June 1823, 2 S. 410.

(*r*) Queensberry Leases, as above.

(*s*) Last reference.

(*t*) Bell's Princ. 1752; Hunter, as in (*n*); E. Elgin, 13th June 1821, 1 S. (Ap.) 44.

(*u*) Cathcart, 31st Jan. 1755, M. 15,399, 15,403, B. S. 5. 818; affirmed on ap.; Leslie, 2d March 1779, M. 15,530, 2 Hailes, 832, affirmed. See Turner, 6th Dec. 1811, F. C.

(*v*) Hamilton, 16th Feb. 1757, M. 15,408.

(*w*) Mackenzie, 6th March 1824, 2 S. 775. See Cathcart, 31st Jan. 1755, M. 15,399, 15,403, B. S. 5. 818; Bontine, 17th Nov. 1827, 6 S. 74.

(*x*) Rank. of Balgair, 7th Dec. 1763, B. S. 5. 622.

(*y*) Craigie, 4th Dec. 1817, F. C. See Gordon, 14th Nov. 1749, M. 15,384; Suttie, 5th July 1758, B. S. 5. 866; Macleod, 17th Nov. 1827, F. C., 6 S. 77.

273. PROHIBITION TO CONTRACT DEBT (*a*).—(1.) This prohibition is plainly intended for the benefit of the substitutes of tailzie, and of them only. For these substitutes and no other persons have the statutory clauses any force; but their title to complain of acts of contravention does not qualify the feudal right. It must be exercised, and may therefore, like any other right of action, be lost by the negative prescription. Thus, there seems no reason to doubt that an heritable security granted over entailed subjects, if not itself extinguished by prescription, will become available against the substitutes of tailzie, if they neglect to resolve the right of the contravener within the forty years; and it has been seen, that the possession of an heir on a fee-simple title for that period works off the whole fetters of the tailzie; (above, § 125). But if the substitutes of entail have the sole title to resist the contraction of debts as against the estate, it follows that the acts and deeds and debts of the last substitute are effectual against his heir whomsoever, who is not an heir of tailzie; (above, § 266. 7.) On the same principle, when the entail comes to an end by the operation of the law, *e. g.* where, by the forfeiture of the right of the member in possession, the estate passes to the Crown freed and discharged of all limitations, substitutions and remainders, the Crown has been held to be in the situation of the heir whomsoever of the last substitute, and not entitled to found upon clauses intended for the benefit of substitutes of entail only, so as to take the estate free of the debts of the forfeiting person (*b*). (2.) The prohibition to burden, or to contract debt, so as to affect the lands, is subject to the rules of construction which regulate the other limitations. The restraint must be imposed in a substantive shape, and is not to be deduced by implication. Thus, a prohibition *to alter, innovate or infringe the tailzie, or the order of succession therein appointed, or the nature or quality thereof, any manner of way,* does not disable the member in possession from burdening the estate. But the terms, *to contract debt on the lands, or to burden the same, in whole or in part, with debts or sums of money,* are sufficiently comprehensive; for although both phrases strictly imply voluntary contractions only, and do not embrace judicial burdens by

adjudication, yet the meaning of the entailer is clear, to prevent the lands from being burdened with debt in any form (*c*). It is advisable, however, to employ the ordinary words of style. (3.) Although this limitation can extend no farther than to prevent the imposing real burdens on the lands, or in other words, to preserve the estate from being affected with voluntary or judicial incumbrances to the prejudice of the succeeding heirs, it has been questioned, but of course without success, if the member in possession does not incur an irritancy by contracting personal debts, a proof (says Lord Kilkerran) that the plainest matters may be made the subject of discussion (*d*). And as the purpose of the entailer is to preserve the estate to the series of heirs expressed in the destination, and not to exclude each possessor in his turn from the full liferent use of it, the lands may be charged with debt by way of annuity, if restricted to the lifetime of the heir in possession, without operating as a contravention of the tailzie. Voluntary securities and liferent trusts over entailed estates, so limited, are accordingly common in practice; (see § 215.) (4.) The prohibition against burdening the lands necessarily excludes the power to grant provisions to children (*e*), or meliorations to tenants (*f*), so as to affect the estate or the succeeding heirs.

(*a*) See note (*a*) p. 364. This prohibition is usually incorporated with the prohibition against contracting debt.

(*b*) Campbell, 17th June 1746, M. 15,505.

(*c*) Mackenzie, 23d May 1823, F. C., 2 S. 331; Haggart, 19th Dec. 1820, F. C.; Nisbet, 10th June 1823, F. C., 2 S. 381.

(*d*) Denham, 15th Dec. 1737, B. S. 5. 200.

(*e*) Borthwick, Feb. 1730, M. 15,556.

(*f*) Hunter's Landlord and Tenant, 586, *et seq.*

274. PROHIBITION TO PERMIT ADJUDICATIONS (*a*).—(1.) The last of the prohibitions in the entail is against permitting special adjudications to pass against the lands, which can only be done with the concurrence of the member in possession. It is competent, however, to adjudge the life-interest of the member in possession without a breach of the prohibition. This may be done in the form of an adjudication of the life-interest merely, or of the lands themselves, under the

express qualification that the security shall, *ipso facto*, be extinguished and the lands redeemed by the death of the debtor, and that its effect, as against the lands, shall then absolutely expire. The latter form is obviously the preferable, as warranting infeftment in, and consequently possession of the lands themselves during the debtor's lifetime; and, in competition, it will exclude a mere infeftment in the life-interest (*b*). (2.) It may, perhaps, be assumed, that every form of diligence and process, even judicial sale, is competent, which goes merely to affect and attach the life-interest of the member in possession, and that, if duly qualified, a decree of adjudication or of sale will not operate as a contravention of the entail (*c*).

(*a*) And also with and under the prohibition and condition that it shall not be lawful to the said *(institute)* or the heirs of tailzie foresaid or any of them to consent suffer or permit that any special adjudication be obtained or passed of any part of the foresaid lands and others before disponed for any sum of money or debts whatsoever.

(*b*) See Grahame, 14th Nov. 1828, F. C., 7 S. 13; and 19th July 1833, S. (Sup.) 101.

(*c*) See Ferrier, 11th July 1835, 13 S. 1121.

275. RESERVATIONS FROM THE PROHIBITIONS (*a*).—The fetters of the entail being duly imposed, certain powers, more or less ample, according to the wish of the entailer, are conferred on the members of tailzie for special purposes.

1. *Power to provide widows.*—(1.) The members of tailzie are usually permitted to grant liferent provisions to husbands and wives by way of locality, not exceeding in whole a certain specified proportion of the yearly rental of the estate, the provision so long as a former locality subsists to suffer a deduction of the amount of such locality. But the faculty to grant such provision is not a *surrogatum* for the widow's terce, where it is excluded: to be binding on the succeeding heirs of tailzie, it must be exercised (*b*). When it is so expressed as to authorise *reasonable provisions*, the Court may exercise an equitable control (*c*). (2.) The object of assigning locality lands for a widower or widow's provision is well explained in the words of the style (*d*), "so as that the liferenters may uplift and receive "the rents of their locality lands, and the succeeding heirs

" of entail may not be engaged or bound for payment there-
" of, or the fee and property of the said lands afterwards affect-
" ed therewith." A power to give infeftment in jointure lands by way of locality differs from a mere faculty to grant bond for a certain proportion of the free rents of the estate. The latter is estimated year by year, according to the actual rental at the time of the annual accounting, whereas, by the former, the wife obtains a certain portion of the lands themselves, which are set aside for her support, and in which she obtains a real and perfect right of liferent. The question, in judging of a right of this nature, is simply, whether the provision be warranted by the deed of entail, and if so warranted, it cannot be afterwards restricted on an emerging reduction, from whatever cause, in the yearly value of the remainder of the estate. The locality is constituted as at the date of the deed by which it is conferred, without regard to that of the infeftment upon it, although it cannot take effect until the death of the granter (*e*). The grantee must, on the other hand, necessarily suffer by a fall in the value of the locality lands.

2. *Power to provide younger children.*—(1.) Provisions to younger children are usually permitted to the extent of a certain number of years' rent, according to the number of the children, but under deduction of such annual burdens as it is the pleasure of the entailer to express. When none are specified, the free rent is taken, under deduction of the widow's liferent annuity; but sums set aside by the heir in possession, for payment of outlays made by his predecessor, in improvements under the statute of Geo. IV., are not deducted (*f*). (2.) These provisions may be granted in the form of personal bonds, containing an obligation on the member in possession, and authorising diligence so as to affect a certain specified proportion, usually a half of the free rents of the estate (*g*); and in the absence of an express declaration to the contrary, the provision is estimated according to the rent of the year current at the period of the granter's death, such rent comprehending the annual produce of mines and quarries, as well as returns for the use of the surface (*h*). The clause generally contains a declaration, that these provisions shall not be assignable, or ground adjudication against the estate,

until other creditors are in course of pursuing adjudications. But all such regulations are matter of arrangement, and no precise rules can be laid down respecting them. (3.) Under a power to grant provisions to younger children, the member in possession may, to the extent of the authorised provisions, act as unlimited proprietor of the lands; and when the entail does not specify a term of payment, it has been held that he may postpone the term so as to impose the burden of the principal, and in the first instance of the interest likewise, upon the heirs who shall succeed after the heirs of his own body (*i*). (4.) The usual form of provision is by personal bond, binding the heirs of entail in their order, and the granter's other heirs *subsidiarie* (*k*). In regard to the powers conferred by statute, see *Contract of Marriage*.

3. *Power to grant feu-rights* (*l*).—It may be of advantage to give a power to the heirs of entail to grant feu-rights under certain regulations. It is advisable so to frame the clause, as to prevent the members from defeating the entail by a fraudulent exercise of the power. This was attempted against the Roxburghe entail (*m*).

4. *Power to sell for particular purposes.*—A power may be granted to sell for payment of the debts of the entailer (*n*), but this is best effected by means of a trust (*o*); or for the purpose of acquiring other lands adjacent to the mansion-house or principal branch of the estate. This, like other similar relaxations, is liable to abuse.

5. *Power to exchange portions of the estate.*—The excambion of detached parts of the lands for other lands more conveniently situated is sometimes given. It may be exercised by statute to a limited extent, and under certain defined regulations (*p*).

6. *Power to grant leases.*—(1.) It is not unusual to fortify the prohibition to alienate by an express restraint from granting tacks for longer than nineteen years, and without grassum or diminution of the rental. Where it is advisable, from peculiar circumstances, to sanction agricultural leases of a portion of the estate of an endurance beyond the ordinary term of twenty-one years, the clause may be so framed as to be both restrictive and permissive (*q*), prohibiting leases in general for more

than nineteen years, and empowering the member in possession to extend the ordinary term in those cases which the entailer has in view. (2.) In order to insure the lands letting at their true value, it is usual to provide that they shall be exposed to public roup, when the old rent cannot be obtained. (3.) Leases of portions of the estate, of not more than five acres, to one and the same person, granted for promoting the building of villages and houses, are permitted by statute (*r*), the term of endurance not exceeding ninety-nine years. The ground must not be within 300 yards of the mansion-house, and the rent not under the former, or with a grassum. The same statute sanctions leases for the improvement and inclosing of entailed lands, for thirty-one years, or for fourteen years and an existing lifetime, or for two existing lifetimes. The conditions and provisions of the statute are strict, and it may therefore be expedient to relax or vary them, which will be done at this part of the deed. (4.) It is usual to give power to widows and widowers to grant tacks of their locality lands for nineteen years, with the consent of the heir of entail in possession.

(*a*) See Jurid. Styles, 1. 229, and foll. These reservations depend on the pleasure of the entailer, and are not strictly construed. It is sufficient, therefore, to refer to the Style-book, where it contains the reservations alluded to.

(*b*) Campbell, 16th Dec. 1816, F. C.

(*c*) See E. Mar, 3d Dec. 1830, F. C. and 9 S. 126; affirmed, 28th September 1831, W. S. 5.

(*d*) Jurid. Styles, 1. 229.

(*e*) Malcolm, 21st Nov. 1823, F. C., 2 S. 514. The clause was in these terms: " Reserving always notwithstanding of the prohibitory clauses above " written power and liberty to the said Margaret Malcolm and the other heirs " of tailzie above specified, to provide their husbands and wives in suitable life-" rents by way of locality not exceeding the half of the present rent of the estate " for the time."

(*f*) 10 Geo. IV. c. 51; M'Donald, 18th May 1836, F. C., and 14 D. 785.

(*g*) Jurid. Styles, 1. 231.

(*h*) Douglas, 15th May 1822, F. C., 1 S. 408; E. of Rothes, 29th Jan. 1829, 7 S. 339.

(*i*) Howden, 17th June 1834, F. C., 12 S. 734; affirmed, 1 S. and M'L. 739; D. of Richmond, 2d Dec. 1837, 16 D. 172. See Erskine, 7th July 1829, 7 S. 844.

(*k*) Crawford, 11th March 1809, F. C. See Roxburghe, 11th Jan. 1820, F. C.; Cleghorn, 18th Jan. 1833, F. C, 11 S. 259, but remitted on ap. for reconsideration, 8th Sept. 1835. The terms of the obligation were, " bind and

"oblige me my heirs of line male of tailzie conquest and provision and other "heirs whatsoever (my heirs of tailzie in the estate of C. being always liable in "the first place) executors and successors whomsoever," &c.

(*l*) SAVING and RESERVING always full power and liberty to each of the heirs and persons succeeding to the said lands and estate notwithstanding the prohibition aforesaid for the sake of erecting villages or the increase and enlargement of those already erected and for the encouragement of trades and manufactures and accommodating artificers or tradesmen or other persons employed therein (*other purposes*) to grant feus of any part of the said tailzied estate not encroaching on the manor-place of D. pleasure-ground deer-park policy or inclosures presently appropriated to the use and accommodation of the proprietor (*bounds excepted according to circumstances*) and for the accommodation and convenience of the mansion-house and residence of the family; no feu so to be granted exceeding part of an acre and the feu-duty not to be under the rent which the lands pay at the time doubling it upon the entry of an heir and tripling it on the entry of a singular successor at the least. *Note.*—When it is intended that the same person shall not be capable of holding more than one feu at a time, this must be expressed. See M. Abercorn, 26th Jan. 1816, F. C.

(*m*) See Innes, 12th Jan. 1808, M. App. *Tailzie*, p. 60, No. 18. (*Clause.*) "RESERVING always liberty and privilege to our said heirs of tailzie to grant "feus tacks and rentals of such parts and portions of the said estate as they shall "think fitting provided the same be not made and granted in hurt and diminu-"tion of the rental of the said lands and others foresaid as the same shall hap-"pen to pay the time the said heirs shall succeed thereto." The power being unlimited, feus were granted of the whole estate to a favoured individual; but they were set aside as *in fraudem* of the entail, the feus contemplated by the entailer being held to be grants in the ordinary course of management and administration, and not such as would convert the right of the heirs of entail into a mere annuity.

(*n*) See Kilburney, 20th Jan. 1669, M. 15,347.

(*o*) Jurid. Styles, 1. 244.

(*p*) 10 Geo. III. c. 51, § 32-3; 6 and 7 Will. IV. c. 42; 1 and 2 Vict. c. 70.

(*q*) Jurid. Styles, 1. 231.

(*r*) 10 Geo. III. c. 51.

276. IRRITANT AND RESOLUTIVE CLAUSES (*a*).—1. *Combined effect.*—These clauses are essential to the strict entail. The irritant declaration annuls the acts and deeds done in contravention of the conditions and prohibitions of the entail; and the resolutive forfeits or resolves the right of the contravener. (1.) It was at one period maintained that these clauses were not indispensable for producing a substantive effect, and that a simple prohibition to dispone or contract debt, whereby the estate might be evicted, necessarily implied an irritancy of all deeds done to the contrary (*b*). But although

the statute of entails does not in words declare that irritant and resolutive clauses are essential for protecting the conditions and fetters of the entail, the inference from its terms has uniformly been considered by the Court to be inevitable, when regarded in connection with the views taken by the Judges in the case of Stormont, which preceded the enactment. (2.) Still it was not until after much discussion that the modern notion of the combined operation of these clauses was generally received. It appears, indeed, to have been held by the House of Lords in an early case, that a prohibition to contract debt, with a declaration irritant of the debt contracted, was effectual to protect the lands without any declaration resolutive of the right of the contravener (*c*). But the decisions of the Court below have since been uniform in support of the rule, that both an irritant and a resolutive clause are essential to secure the fetters of the entail. Thus, the omission of the former is fatal, although the latter be duly expressed; and on the other hand, the insertion of an irritant does not supply the place of a resolutive clause (*d*). (3.) The necessary consequence of a defect in either the irritant or resolutive declaration is to leave the members of tailzie unfettered by the prohibitions against selling or contracting debt: they may dispose of the estate for onerous causes, without being accountable for the price, or burden it at pleasure, and it may be adjudged by the creditors of an heir who has been in possession (*e*). In regard to the effect of a prohibition against altering the order of succession, or alienating the estate, unprotected by the statutory irritancies, see § 248, 270.

2. *Structure of the clauses.*—(1.) By the usual form of the irritant and resolutive clauses, they are intimately combined, and the acts and deeds of the members of tailzie are referred to in general terms. They consist, *first*, of a general declaration resolutive of the right of the contravener; *secondly*, of a declaration irritant of his debts and deeds, and of all adjudications, or other legal execution or diligence following upon them; and, *lastly*, of a declaration resolutive of the right of the members of tailzie on whose debts and deeds such adjudications shall have proceeded. (2.) The clauses, as given in the Style-book, have been subjected to verbal criticism (*f*); and

although the objections were considered as by no means of a serious nature, I have ventured, in transcribing the form in the notes, to suggest a slight alteration, which is shewn by italics. That form is universally employed by good conveyancers; and although the last branch, consisting of the special declaration against adjudications, may to some appear superfluous, as, in apparent effect, a repetition of what is contained in the general resolutive declaration with which the combined clause sets out, there can be no doubt that the form has been carefully prepared with a view to embrace every possible instance of contravention, without expressing more than is strictly necessary.

3. *Terms of the clauses.*—(1.) Although advisable, it is by no means essential, to follow the ordinary style. The clauses may be general, or special so as to refer to every prohibited act or deed; or they may, without injury to the entail, be repeated after each prohibited act or deed. No strict rule is laid down by the statute as to the place and form of their insertion in the deed, and none has been followed in the determination of disputed questions on entails. (2.) But it is essential that the general and special modes of reference shall not be mixed up together, without at least carrying out the special reference to the fullest extent. Thus, where the prohibitory and irritant clauses were unexceptionable, but, in the resolutive clause, (which, although commencing with a general reference to the fetters, was controlled by the enumeration of certain acts as specially forbidden,) the power to alienate was omitted, it was held that the heir in possession was not disabled from selling the estate (*g*.) The same was the result where the general reference, thus combined with a defective enumeration of particular acts, was declared to be *without prejudice of the specialties* (*h*), and even where the general reference seemed unrestricted in its meaning, but only particularised and enforced with respect to individual acts and deeds (*i*). (3.) When, again, the clauses are framed upon the principle of a special reference, the omission of a particular prohibition in the irritant or resolutive declaration, without any question leaves the members of tailzie to that extent unfettered (*k*). Such cases furnish an emphatic

lesson to the conveyancer to trust solely to the approved clauses of style. As respects the application of the clauses to the persons restrained, see § 267-9.

4. *Omissions or defects in reference.*—In another class of cases, where the precise application of the irritant or forfeiting terms to the acts prohibited, is prevented by the omission of words, or even the use of the singular for the plural number, there is much risk of the fetters being found inoperative. (1.) Thus, a mere clerical omission in the irritant clause was held fatal. The clause declared, that *not only the said lands and estate shall not be burdened with or liable to the debts and deeds, crimes and acts contracted, granted, done or committed contrary to these conditions and provisions, or restrictions and limitations, or to the true intent and meaning of these presents,—shall be of no force, strength, or effect, &c.* Here the nominative to the verb *shall be* was omitted, and thus the terms by which the debts, deeds, &c. were declared void, were not connected with the prior enumeration, by words occurring in the deed itself; and the House of Lords, following the principle of rigid construction, held that there was therefore no irritant clause effectual to annul the debts and deeds of the heir in possession (*l*). (2.) Thus, also, in a recent case, where a clause of a complex structure, partly conditional, prohibitory and irritant, contained two distinct and separate declarations or provisions—one in the form of a condition to possess under the entail, the other in that of a prohibition against selling or contracting debt, which, in the irritant branch of the clause, were referred to by the terms *provision above set forth;* the Court, disregarding the argument from intention, held, that as the word provision did not embrace both the condition and the prohibition, and could not with certainty be applied to either, the heir in possession was not disabled from selling or contracting debt (*m*). (3.) The irritant and resolutive clauses must be directed against the institute and heirs according to the rules above explained; but in declaring the nullity of forbidden acts and deeds, it is not necessary to add, in express words, that they shall be ineffectual as against the persons called to the succession. It is sufficient that they are declared to be null and void (*n*).

5. *Contravener forfeits for himself only.*—(1.) In the form of these clauses given in the notes, the forfeiting terms are limited in their application to the contravener only by the words, *shall for him or herself only forfeit amit and lose all right*, &c. Such express restriction does not, however, appear to be necessary. The penal consequences of an act of contravention seem to be confined to the contravener, unless it is otherwise expressed (*o*). The possible effect of extending them to the descendants of the contravener ought to be in the view of the conveyancer; for it is manifest that an heir in the obnoxious line could have no interest to complain of acts of contravention. These might, in numerous instances, thus pass unnoticed, and obtain effect by prescription. (2.) The penal consequences of an act of contravention are purged by the extinction or expiry of the right granted contrary to the prohibitions (*p*); and it has uniformly been assumed that they cannot be enforced after the death of the contravener, even where the forfeiture is directed against the heirs of tailzie *and their descendants* (*q*).

6. *Deeds prohibited must be reduced.*—(1.) Deeds executed in contravention of the tailzie are not in themselves invalid: they flow from a feudal proprietor, and being exceptionable by force alone of the statute, they are effectual until reduced (*r*). (2.) The statute gives a title to substitutes in entails which contain irritant and resolutive clauses, both to challenge acts and deeds done in contravention of the tailzie, and to resolve the right of the contravener; but it is by no means essential to the exercise of such right of challenge, that an action of declarator of irritancy shall likewise be brought against the contravener. The notion of the common law, that whilst the right of the heir in possession subsisted, his deeds must receive effect, seems no longer to be received. It is enough under the statute, that power is given to deprive him of the estate; but such power is vested in the substitutes of entail alone, who may or may not choose to enforce it. Their title to reduce the deeds themselves is a separate right, and operates against the users of those deeds, to whom it is *jus tertii* to maintain that the right of the contravener still subsists. The reduction of a forbidden deed may be pursued even after the

death of the contravener (*s*). (3.) It has been successfully maintained, that where the entail contains a declaration that the contravener shall forfeit for himself and his descendants, an heir descended from the body of a contravener is barred from objecting to an act of contravention (*t*); and although, in another case, a different view prevailed, the action was pursued with the concurrence of a substitute not in the line of descendants (*u*). These instances serve to shew the propriety of saving the descendants of the contravener from the consequences of his forfeiture, and thus giving them an interest to complain of acts of contravention.

7. *Purging of irritancies.*—It is worthy of the consideration of the conveyancer in preparing a deed of entail, whether the latitude to be extended to the members of tailzie, in purging irritancies, ought not to be distinctly defined. Under these clauses, as they are usually expressed, the rule seems to be, that an act of contravention may be purged at any period during the lifetime of the contravener, if no damage has been done to the estate; and, accordingly, an heir of tailzie disregarding the condition to bear the name and arms of the entailer, has been allowed to resume them even after process of declarator (*v*). But after the death of an heir contravening the prohibition against alienation, by granting leases of an unusual endurance, purgation has been refused to the tenants (*w*). In these circumstances, it may be advisable to declare either that purgation is wholly excluded, or shall be inadmissible, unless made within a fixed period after the act of contravention.

(*a*) AND with and under these IRRITANCIES following that if the said *(the institute)* or any of the heirs of tailzie above written shall contravene any of the conditions or prohibitions herein contained either by failing or neglecting to perform or fulfil the said conditions and every one of them or by acting contrary to the said prohibitions or any of them THAT in any of these cases the person contravening by failing and omitting to obey the said conditions or any of them or acting contrary to the said prohibitions or any of them shall for him or herself only forfeit amit and lose all right title and interest to the foresaid lands and estate above disponed in the same manner as if the contravener were naturally dead AND the right thereof shall devolve upon the next heir of tailzie though descended of the contravener's body to whom it shall be lawful whether major or minor at the time to pursue declarators of irritancy and to make up titles to the said lands and estate by serving heir to the person last infeft therein before the contravener or to the contravener him or herself without being anywise liable for such contravener's debts and deeds or to make up titles by de-

clarator or adjudication or any other way by law competent And it is hereby expressly PROVIDED and DECLARED that all the debts and deeds of the said *(institute)* or of any of the heirs of tailzie above written contracted made or granted as well before as after their succession to the said lands and estate in contravention of this present entail and provisions conditions and prohibitions herein contained and all adjudications or other legal execution and diligence that shall happen to be obtained or used upon (for *the same*, read, *any of the said debts or deeds)* (excepting as is above excepted) shall not only be void and null with all that shall or may follow thereupon in so far as they might any wise affect the said lands and estates BUT ALSO the said *(institute)* and heirs of tailzie foresaid respectively upon whose debts and deeds such adjudications have proceeded shall *ipso facto* lose and forfeit their right and title to the said lands and estate and the same shall devolve to the next heir of entail in like manner as if the contravener were naturally dead and that freed and disburdened of the said debts and deeds and adjudications or other diligence deduced thereon.

(*b*) Gardner, 27th Jan. 1744, M. 15,501-3.

(*c*) Craig's Crs. 13th July 1712, M. 15,494; Robertson's Ap. 110.

(*d*) Bell's Princ. 1732; Reidheugh, 11th March 1707, M. 15,489; Hepburn, 8th Feb. 1758, M. 15,507; affirmed, 7th Dec. 1758; Mitchelson, 15th June 1831, 9 S. 741. See Craig's Crs. as above.

(*e*) Stewart, (Ascog case,) 23d Feb. 1827, F. C., 5 S. 418, as reversed, W. S. 4. 196; Bruce, 21st June 1827, F. C., 5 S. 822, as reversed, W. S. 4. 240; Elibank, 2d July 1833, F. C., 11 S. 858; affirmed, 19th March 1835, 1 S. and M'L. 1; Mitchelson, as in (*d*).

(*f*) See Elibank, 21st Nov. 1833, F. C., 12 S. 74.

(*g*) Bruce, 15th Jan. 1799, M. 15,539, (Tillycoultry case.)

(*h*) Dick, 14th Jan. 1812, F. C.

(*i*) Horne, 17th Jan. 1837, F. C., 15 D. 372, as reversed, March 1838.

(*k*) Barclay, 18th May 1821, 1 S. (Ap.) 24.

(*l*) Sharpe, 3d July 1832, F. C., 10 S. 747; as reversed, 18th April 1835. 1 S. and M'L. 594.

(*m*) Speid, 21st Feb. 1837, F. C., 15 D. 618.

(*n*) Munro, 15th Feb. 1826, F. C., 4 S. 467; affirmed, W. S. 3. 344.

(*o*) See Gordon, 14th Nov. 1749, M. 15,384; Bontine, 2d March 1837, F. C., 15 D. 711.

(*p*) Mackay, 23d Nov. 1798, M. 11,171.

(*q*) See Mackay, as in (*p*); Turner, 17th Nov. 1807, M. App. *Tailzie*, No. 16; affirmed, 1 Dow, 423; Mordaunt *v.* Innes, 9th March 1819, F. C., and opinion of Lord Robertson.

(*r*) Agnew, 23d June 1813, F. C. See Sandford on Entails, 276, *et seq.*

(*s*) Mordaunt *v.* Innes, as in (*q*), and 5th July 1822, S. (Ap.) 1. 169, and cases cited. See Kames Eluc. 373.

(*t*) Gordon, as in (*o*); Gilmour, 6th March 1801, M. App. *Tailzie*, No. 9.

(*u*) Turner, as in (*q*.)

(*v*) Hamilton Gordon, 23d July 1748, M. 2336 and 7281; Ross, 18th Nov. 1766, M. 7289, B. S. 5. 932. See Abernethie, 20th June 1837, F. C., 15 D. 1167.

(*w*) Queensberry Exec. 6th July 1820, F. C.; affirmed, 2d July 1821, S. (Ap.) 1. 59; E. of Wemyss, 2d Feb. 1821, F. C.; Hislop, 2d July 1821, S. (Ap.) 1. 64.

277. PROVISIONS (*a*).—The destination, conditions, limitations, and irritant and resolutive clauses, when properly expressed, are effectual to constitute a valid tailzie, to endure if heirs-portioners be excluded, and there are no causes of decay external to the deed, so long as the series of heirs continues to exist. It is necessary, however, to provide for the contingencies which attach to the right; and the provisions which are introduced for that purpose, being proper conditions of the right of succession, each member in possession is bound to implement them under the penalty of forfeiture.

(*a*) For the usual provisions inserted in entails, see Jurid. Styles, 1. 233, *et seq.*

278. PROVISION AS TO THE MODE OF SUCCESSION ON CONTRAVENTION (*a*).—(1.) The next heir in the order of succession, or if he shall unnecessarily delay to exact the forfeiture, any substitute however remote may complain of an act of contravention (*b*). This right flows necessarily from the status which the substitutes hold as creditors of the member in possession, to the effect of enforcing implement of the obligations of the entail, and the manifest interest which each has to throw the contravener out of the line of succession. (2.) But as irritancies, more especially those introduced by statute, are to be strictly interpreted, the contravener forfeits only for himself, and not also for the heirs of his body, unless it is so provided (*c*). Nevertheless it is usually in express terms declared, that the heir of the contravener's body shall succeed upon a declarator of contravention, and provided that he shall take up the succession on his coming into existence, even although the person who was the nearest heir at the time of the contravention shall already have assumed possession.

(*a*) Jurid. Styles, 1. 233.

(*b*) Simson, 6th Jan. 1697, M. 15,353; Irvine, Jan. 1723, M. 15,369; Dundas, 29th Nov. 1774, M. 15,430.

(*c*) Gordon, 14th Nov. 1749, M. 15,384.

279. PROVISION AS TO DEBTS AND ADJUDICATIONS (*a*).—(1.) When the entailer dies leaving debts, the institute or disponee takes the estate, under burden of the debts. An heir

of entail making up a title as such, although he does not take the benefit of an inventory, is said not to incur a universal representation of the entailer (*b*). (2.) It has been customary for the member in possession who wishes to disburden the estate of those debts, to apply for the authority of Parliament to sell a portion of the lands, but he may avail himself of the provisions of a recent statute (*c*); yet it appears to have, at an early period, been held that a prohibition *to sell, anailzie, wadset or dispone*, did not disable the member in possession from selling for payment of the debts of the entailer (*d*). (3.) Although a member of the tailzie, on coming into possession, becomes liable in payment of those debts, he is not bound, without a provision to that effect, to discharge them out of his separate funds, and to transmit the estate unincumbered to his successors. He may constitute them, if personal, as real burdens on the estate, by adjudication deduced in name of a trustee (*e*), or keep up the debts against the estate and the succeeding heirs by means of *assignations* (taking care that these shall not contain *discharges*) from the creditors (*f*). (4.) When thus vested in the person of a member of tailzie, or a trustee for his behoof, the debts do not bear interest, or rather, the obligation being to pay out of one pocket what is to be put into the other, is suspended during his lifetime; but it revives on the death of such member, if his heir of line be not likewise the next heir of tailzie (*g*). He may assign the debts so as to affect the rents of the estate during his lifetime (*h*). (5.) When the debts are vested in a stranger, the member in possession must keep down interest or annuities, and he has no claim of relief against future heirs; but in so far as not discharged by him, such interest and annuities remain a burden on the lands (*i*). (6.) It is thus obviously for the safety of the tailzie to take the institute and substitutes bound by an express provision to discharge the entailer's debts, and purge adjudications led against the estate, a provision which will secure the extinction of the debts, if actually paid by the member in possession, or on his neglect, the devolution of the estate to the next heir willing to implement it. This he may do by means of a sale under the statute of Will. IV., or in virtue of the

entail, if it contain a faculty to charge the estate with the entailer's debts and sell part of it for their payment (*k*). But where the entailer is owing considerable debts, the safest mode of providing for their payment, is by a trust constituted with reference to the entail.

(*a*) Jurid. Styles, 1. 233.

(*b*) Bell's Princ. 1743; Sutherland, 26th Feb. 1801, M. App. *Tailzie*, No. 8. See Maitland, 5th Dec. 1755, 5 B. S. 837; Murray, July 1748, 5 B. S. 764.

(*c*) See Mitchell, 4th Feb. 1809, F. C.; 6 and 7 Gul. IV. c. 42.

(*d*) E. of Lauderdale, Feb. 1730, M. 15,556.

(*e*) Murray, as in (*b*).

(*f*) See Ker, 15th Feb. 1758, M. 15,551; Lawrie, 7th Dec. 1830, 9 S. 147.

(*g*) Stair, 1. 18, 9; Ersk. 3. 14. 27.

(*h*) Welsh, 11th Feb. 1837, F. C., 15 D. 537.

(*i*) Campbell, 29th Nov. 1815, F. C.; Erskine, 7th July 1829, F. C., 7 S. 844; Sands, 7th July 1835, F. C., 13 S. 1040; D. of Richmond, 2d Dec. 1837, 16 D. 172.

(*k*) See Strathallan, 29th May 1828, 6 S. 881.

280. PROVISION FOR THE EXCLUSION OF A CONTRAVENER (*a*).—It is usual to provide by an express clause, that a person against whom an act of contravention has been declared, shall be excluded from the management of the estate even as administrator-in-law for his own child, lest, under colour of such management, he should continue his possession.

(*a*) Jurid. Styles, 1. 235.

281. PROVISION FOR COMPLETING TITLES (*a*).—(1.) In order to preserve the estate subject to the fetters of the tailzie, it is essential not only that the deed shall have been once feudalised and recorded, but that each and every heir shall complete a title under the entail (*b*). And that this may be done, a provision is introduced which confers authority on the future heirs to enforce the obligation against the member in possession (*c*). The tailzie runs a double risk on the succession of an heir. He may complete a fee-simple title to the lands, and if none has been completed under the entail, his possession will be ascribed to such fee-simple title, and the fetters of the entail may be worked off by prescription; (§ 125); or in renewing the investiture he may omit all or

part of the restraining clauses, and thus subject the estate to the diligence of creditors. For these reasons, it may, in particular circumstances, be advisable for future heirs to watch the proceedings of the heir in possession. (2.) In completing the title of an heir, the statute requires that the *provisions and irritant clauses* shall be repeated in the rights and conveyances whereby he shall brook and enjoy the tailzied estate, and it has never been doubted that these are comprehensive terms applicable to the whole clauses proper to the strict entail. Rights and conveyances, in the sense of the act, include all deeds and writs which form part of the heir's title, and therefore embrace precepts and instruments of sasine; but it has been questioned if the retour of a general service falls within the scope of the act, since it is a mere link connecting the heir with unexecuted feudal clauses to which his predecessor had right. The Court determined that an heir omitting to insert the irritancies in the retour of his general service, had committed an act of contravention; but the decision was reversed on appeal, and practice has been in accordance with the opinion of the court of review (*d*). (3.) A trust-conveyance for the purpose of trying the validity of the entail in name of the trustee, does not infer contravention, provided the clauses are inserted in the reconveyance (*e*). (4.) The retour of a special service, as the immediate warrant on which a precept for infeftment is granted, must contain the clauses of the entail; and it may be broadly stated, that whether an heir enter by the forms proper to that character; or as disponee under a conveyance from a prior member of tailzie; or in virtue of a service under a decree of declarator of contravention; or under an adjudication in implement of a decree obtained to enforce a clause of devolution; or by adjudication on a trust-bond and reconveyance by the trustee (*f*), he must insert the clauses in his titles. (5.) It will be observed that neither the condition to feudalise and record the deed of entail, nor this provision that each heir on his succession shall repeat the clauses in his title-deeds, will be of the slightest avail against creditors or other *bona fide* singular successors, unless duly obeyed. The statute, in express words, saves their rights (*g*). (6.) It may thus be inferred, that questions upon

the statutory formality of the titles made up by a member of tailzie, affect himself only; and that so long as there exists, in a feudal sense, a valid title which has not been challenged by a substitute of entail, not only are singular successors safe, but the rights of vassals taking an entry from a contravener, are unaffected by the acts which he has committed in violation of the tailzie. To hold that parties possessing on subaltern rights under an entailed superiority, were bound to look beyond the mere feudal sufficiency of the title actually standing in the person of the existing superior, and to judge of the effect of statutory penalties, would be to impose an intolerable burden on vassals applying for a renewal of their investitures.

(*a*) Jurid. Styles, 1. 235.
(*b*) 1685, c. 22, above, p. 336.
(*c*) This seems to be competent without an express provision. See Maule, 1st March 1782, M. 10,963.
(*d*) Erak. 3. 8. 30; Stewart, 1st Feb. 1726, M. 7275, as reversed on ap., 1 Cr. and St. 233.
(*e*) Maclauchlan, 27th Jan. 1768, M. 15,421.
(*f*) See Henderson, 12th Nov. 1796, M. 15,442. See Craigie, (Roxburghe entail,) 19th Jan. 1808, M. App. *Adjud.* No. 16; Maclauchlan, as above.
(*g*) 1685, c. 22; above, p. 336.

282. ASSIGNATION TO THE TITLE-DEEDS AND RENTS.—This clause does not call for special notice; (see § 58.)

283. OBLIGATION TO RELIEVE THE HEIRS OF DEBTS (*a*).—The entailer usually binds himself and his representatives to relieve the heirs of entail of the debts that may affect the estate, which thus become a burden upon his executry or separate estate, and the members of tailzie have a right to see that such separate estate shall be applied to their relief (*b*).

(*a*) Jurid. Styles, 1. 236.
(*b*) Stewart *v.* Denham, 7th Feb. 1735, Elch. *Tailzie*, 3.

284. CLAUSES OF REVOCATION AND DISPENSATION (*a*).—(1.) In order to fulfil the feudal rule, that a conveyance of heritage must be *de præsenti*, the deed of entail is in form an absolute disposition of the lands, to take immediate effect, and to ex-

clude the objection of non-delivery, the delivery of the deed is dispensed with. But as is customary in *mortis causa* conveyances, (see § 240,) the maker reserves a power to alter, which controls the absolute *de præsenti* grant. (2.) This power of alteration and revocation need not of course be formally exercised so long as the deed remains in the custody, and under the power of the entailer: the deed may be cancelled or destroyed (*b*). But if it has been recorded or put beyond his control by delivery to a party interested, or one acting for him, a revocation by deed is necessary. A deed of revocation of an entail which has not been feudalised, is effectual if it duly express the will of the maker to alter his intention (*c*); but if infeftment has followed and been perfected by registration, it is necessary that the investiture thus completed be altered by a valid conveyance to the heir-at-law, or a new series of heirs of provision, or at least, that an obligation be duly and formally imposed on the heirs under the investiture so completed to reconvey the lands. Such obligation will enable the heir-at-law, or the disponee in the new conveyance, to effect a change of the investiture by adjudication in implement (*d*). (3.) But if no power of revocation has been reserved, it is incompetent for the entailer, as liferenter, and the institute, as fiar, by a joint deed, to alter or revoke a feudalised entail (*e*). Where, however, an entail, although registered, continued personal, it was held to be revocable by the maker without the consent of the favoured parties, the deed being gratuitous, and in favour of heirs *nascituri* (*f*).

(*a*) Jurid. Styles, 1. 241.

(*b*) See Burnet, 9th Dec. 1701, M. 15,566.

(*c*) See Logan, 13th Dec. 1797, M. 11,379.

(*d*) See Porterfield, 15th May 1821, F. C., 1 S. 9; remitted, 2 W. S. 369, adhered to, 13th Nov. 1829, F. C., and (18th Nov.) 8 S. 16, affirmed, 5 W. S.

(*e*) Gordon, 25th Jan. and 2d Aug. 1771, M. 15,579; affirmed, Swinton, p. 48. The authority of the prior case of E. Moray, 25th Jan. 1744, Elch. v. *Tailzie*, 22, B. S. 5. 734, disregarded.

(*f*) Scott, 23d June 1713, M. 15,569. See More's Notes on Stair, cxci.

285. PROCURATORY FOR RECORDING (*a*).—1. *Mode of registration.*—The Court of Session is required by the statute of 1685 to interpone their authority to the original deed of en-

tail when produced judicially, and a register-book is appointed to be kept, "wherein shall be recorded the names of the maker "of the tailzie, and of the heirs of tailzie, and the general "designations of the lordships and baronies, and the provi- "sions and conditions contained in the tailzie, with the fore- "said irritant and resolutive clauses subjoined thereto, to "remain in the said register *ad perpetuam rei memoriam*" (*b*). (1.) Although the statute, in express words, provides that the *original tailzie* shall be produced judicially, it is remarkable, that in the first application (*c*) made for the authority of the Court to the registration of the terms of an entail, warrant should have been granted to record not the deed itself, which was in the form of a procuratory of resignation, but the charter following upon it. The objection of undue registration of that entail was, at the distance of nearly a century, sustained on the authority of the judgment in a prior case (*d*). (2.) The statute is retrospective, (a view which was not at first taken by the Court,) and that even where the deed was feudalised prior to its enactment (*e*). (3.) The terms of the statute sanction the notion, that the Legislature contemplated the insertion in the register of a mere abstract from the original deed. But in practice the full tenor is recorded, and the Court have refused to authorise the exclusion even of part of the lands which had been sold by the entailer (*f*). (4.) The necessity of registration of the entail itself is not superseded by the registration of a sasine upon the deed, or on a charter following upon it.

2. *Who may apply for registration.*—(1.) It was at an early period maintained that a substitute heir had no title to apply directly to the Court for authority to have the deed recorded, and that the only competent remedy was by action against the member in possession, to compel him to produce the deed judicially. This circuitous course of enforcing a measure essential to the completion of a right in which all the substitutes have a contingent interest appears, indeed, to have in one instance been sanctioned by the Court (*g*); but it has since been abandoned; and although the entailer or the institute is the proper party to produce the deed for registration, it is now held that any substitute, however remote, may

obtain the authority of the Court, if he can produce the deed (*h*), or force it from the party possessor by incident diligence, which will be granted for that pnrpose (*i*); but an heir-female cannot apply without the concurrence of her husband, even where the *jus mariti* and right of administration, in regard to the estate, are excluded (*k*). If the deed shall have been recorded in any other register, warrant will be obtained for its transmission to the process (*l*). (2.) It has been questioned if an heir whomsoever has a title to apply for registration (*m*). (3.) As entails are usually in the form of a *mortis causa* conveyance, the statute would, in most cases, be inoperative, unless registration were admitted as well after as before the death of the entailer, and this has uniformly been sanctioned (*n*). (4.) The form of the application is by summary petition (*o*). It would appear, therefore, that this clause is not of any real use.

(*a*) AND ALSO I hereby grant full power and commission to as my procurators or to any one of the heirs or persons members of tailzie foresaid to cause present this deed of entail before the Lords of Council and Session judicially and procure the same recorded in the register of tailzies and to expede charters and infeftments thereon agreeable thereto and in terms of the Act of Parliament passed in the year 1685 anent tailzies: AND I oblige my said disponee or heirs of tailzie for the time to reimburse and pay the whole charges of recording these presents to the person who disburses the same with the double of the costs of any process which such person shall raise and prosecute for obtaining the reimbursement thereof.

(*b*) 1685, c. 22, see p. 336.

(*c*) See Irvine, below.

(*d*) Irvine, 26th June 1776, M. 15,617, and App. *v. Tailzie*, No. 1; affirmed, 16th April 1777; on authority of Kinnaird, 26th Nov. 1761, M. 15,611; affirmed, 18th Feb. 1765.

(*e*) Philp *v.* E. Rothes, 14th Dec. 1758, M. 15,609, B. S. 5. 365-869, affirmed; Kinnaird, as above; E. of Roseberry, 22d June 1765, M. 15,616; Irvine, as above.

(*f*) Moore, 28th Nov. 1821, F. C., 1 S. 173.

(*g*) Drummond, noticed in Nairne, below.

(*h*) Ersk. 3. 8. 26; Bell's Princ. 1742; Nairne, 10th March 1757, M. 15,605; B. S. 5. 335. See Reid, 25th Feb. 1710, B. S. 4. 794; Napier, 20th July 1762, B. S. 5. 888; Gordon, 11th Jan. 1704, M. 5787.

(*i*) Ker, 7th July 1804, M. 14,984.

(*k*) Hamilton, 11th March 1777, B. S. 5. 625.

(*l*) Campbell, 14th Nov. 1748; Elch. *v. Tailzie*, 35.

(*m*) Jessop, 7th Feb. 1822, 1 S. 294.

(*n*) See cases, note (*k*), above.

(*o*) Ersk. as above; Ker, as above; Bell's Princ. 1742; Jurid. Styles, 3. 907.

286. PRECEPT OF SASINE.—This clause may contain a bare reference to the conditions, prohibitions, and forfeiting clauses, if they are duly expressed in a prior clause. (See § 254.)

287. INFEFTMENT.—(1.) In the sasine upon the deed of entail, the essential peculiarity in point of form is, that it contains the whole conditions, prohibitions, clauses irritant and resolutive, and provisions of the tailzie. These are introduced in the narrative of the warrant of infeftment, and referred to in the narrative of the delivery of sasine (*a*). (2.) In regard to effect, it will be observed, that as a step in the feudal title, the sasine will be valid, although the whole restraining clauses of the entail are omitted. The omission of a part of the destination subsequent to the name or description of the heir in possession, or of the conditions, prohibitions, irritant or resolutive clauses or provisions of the deed, although operating as an act of contravention, will not annul the sasine; and although the right of the contravener will be forfeited in so far as the estate has not been alienated or evicted, the statute protects the interests of creditors and purchasers contracting *bona fide* with the contravener (*b*). Future heirs have thus a manifest interest to see that proper titles are made up under the entail. Frauds against the substitutes have been attempted, but there is not much risk of their occurring in modern practice.

(*a*) Jurid. Styles, 1. 270.
(*b*) See the statute, p. 336.

288. ENTRY WITH THE SUPERIOR.—In completing a public right under a deed of entail, the institute, or first person taking up the succession, will enter according to the state of the title; and, in a feudal respect, the procedure does not call for particular remark. It will be observed that charters are among the deeds enumerated in the statute, and that the acceptance of a charter from the superior, which does not contain the conditions, provisions, prohibitions, and irritant and resolutive clauses of the entail, will infer an act of contravention on the part of a member of tailzie (*a*).

(*a*) 1685, c. 22. above, p. 336.

289. STATUTES.—It followed from the nature and purpose of a completed entail, that the members of tailzie were excluded from the exercise of the rights of unlimited fiars beyond their own respective life-interests, unless to the extent of the powers expressly conferred by the entailer. In order to relax the restraints imposed by the statute of 1685, the Legislature has, from time to time, made enactments, founded upon expediency and obvious utility, whereby certain powers are conferred on the members of tailzies, without regard to the terms of the entail under which they possess their estates. These powers may thus, in some instances, fall short of the express faculties contained in the deeds, although in general they exceed them. In a work of this description it is sufficient to refer to the statutes themselves. The principal are, (1.) The act of 20 Geo. II. (*a*), which confers a power on members of tailzie to sell and convey superiorities to the vassals, the price to be laid out in lands to be settled under the fetters of the entail. (2.) The act of 10 Geo. III. (*b*), which relates to improving and building leases, improvements on lands, building and repairing mansion-houses, and excambions. (3.) The act of 42 Geo. III. (*c*), which authorises sales for redemption of the land-tax. (4.) The act of 59 Geo. III. (*d*), relative to the building of gaols. (5.) The act of 4 Geo. IV. (*e*), which enables the heirs to burden the estate to the extent of a year's rent, for the expense of making roads. (6.) The act of 5 Geo. IV. (*f*), commonly called Lord Aberdeen's Act, which gives power to provide husbands and wives. (See *Marriage-Contract.*) (7.) The act of 6 and 7 William IV. (*g*), relative to sales for payment of entailer's debts, granting tacks and making excambions. (8.) The act of 1 and 2 Victoria (*h*), which extends the provisions of the statute of William IV. as respects tacks and excambions.

(*a*) 20 Geo. II. c. 50.
(*b*) 10 Geo. III. c. 51.
(*c*) 42 Geo. III. c. 116.
(*d*) 59 Geo. III. c. 61.
(*e*) 4 Geo. IV. c. 49.
(*f*) 5 Geo. IV. c. 87.
(*g*) 6 and 7 Will. IV. c. 42.
(*h*) 1 and 2 Vict. c. 70.

TITLE IV. MARRIAGE-CONTRACT OR SETTLEMENT.

290. INTRODUCTORY REMARKS.—The contract of marriage, as its name imports, is a deed of agreement, which, in the ordinary case, is bilateral, but becomes by the accession of other parties, *e. g.* of the father of one or other of the spouses, a multilateral writ. Deeds of this description are the products of civilisation, their purpose being either to enlarge or restrict the legal rights of the spouses. These rights were, at an early period, sufficient for the regulation of the pecuniary affairs of the parties, and the distribution of their property after the dissolution of the marriage; but after capital had accumulated, and land acquired increased value by cultivation, the simple rules of law were found, in many instances, to be inconvenient and unsuited to the circumstances of persons contracting marriage, who came thus, by mutual arrangements, to establish particular codes for themselves adapted to the circumstances of each individual case. These, to exclude the operation of the law, behoved to be reduced to writing, and hence the origin of our contracts of marriage. As respected the moveable property of the contracting parties, the rules of law were without difficulty controlled or superseded; but when they were possessed of heritage, even the favour extended to matrimonial arrangements could not in every instance bend the feudal usages to their purposes. Craig (*a*) informs us that a father could not give infeftment to his daughter in more than the one-half of his lands *nomine dotis*, without incurring recognition, although he might validly confer a right to the rents for a certain number of years; and although the contrary rule prevailed where a wife conveyed her estate to her husband, it was founded on a presumption that the superior had consented to the marriage. The transmission of heritage being now unfettered by feudal restraints, its destination may, without difficulty, be regulated in the marriage-contract.

(*a*) Craig, 3. 8. 18.

291. ANTE AND POSTNUPTIAL.—A marriage-settlement may be antenuptial or postnuptial, entered into before or after

the celebration of the marriage. An antenuptial contract is in law an onerous deed, and is a good title in competition with creditors. It is in all cases, therefore, advisable to enter into a contract before marriage, where the parties intend to make their affairs the subject of express arrangement. A postnuptial contract, however, is not absolutely null. Although exceptionable in a question with creditors, it is binding on the parties and their heirs, and is not subject to alteration in the contract of a subsequent marriage, to the extent at least of a reasonable provision (*a*). But a postnuptial contract, in which there is much inequality, has been held to be subject to revocation, as *donatio inter virum et uxorem* (*b*).

(*a*) See Ersk. 4. 1. 33-4; Bell's Princ. § 1942; Wood, 3d Dec. 1823, F. C., 21, 549; Jeffrey, 24th May 1825, 4 S. 32; Bell's Com. 1. 636, 641, and 2. p. 188, 190.

(*b*) Steven, 1st Feb. 1809, F. C. See as to donations *inter virum et uxorem*, Bell's Princ. 1616, *et seq.* and cases cit. See Anderson, 27th Jan. 1837, 15 D. 435; Craigie, 17th June 1837, 15 D. 1157.

292. RULES OF CONSTRUCTION.—The husband, as *persona dignior*, the head of the family, is *in dubio* presumed uncontrolled proprietor of the subjects, whether heritable or moveable, in the possession of the spouses. In interpreting clauses relating to the fee and liferent of lands contained in contracts of marriage, this principle is of constant application; and although the presumption may be excluded by express words, or even clear indication of a contrary intention (*a*), the circumstances are few in which it is controlled by law. It is a rule of practice, therefore, to employ terms that admit of no ambiguity, in all cases where it is intended to limit the rights and powers of the husband. The subject of marriage-contracts is extensive. The clauses vary much, according to the wishes of the parties; and all that can be attempted here is some account of the more ordinary clauses of contracts which relate principally to heritage. The clauses contained in the common form of the contract are sixteen in number, viz. the introductory clause; the dispositive; the obligation to infeft; clause conferring provisions on the wife or husband; tenendas and reddendo; procuratory of resignation; clause conferring provisions on the younger children; discharge of the wife or

husband's legal claims; discharge of the children's legal claims; assignation by the wife or husband; declaration as to the subsistence of the provisions; appointment of trustees; clause of registration; precept of sasine; and testing clause (*b*).

(*a*) See Young, 2d Dec. 1835, 14 D. 85.
(*b*) Jurid. Styles, 1. 174, and foll.

293. INTRODUCTORY CLAUSE (*a*).—(1.) The inductive cause of the contract of marriage is the intended marriage of the parties. By its express terms they accept of each other for lawful spouses; and although these words are not evidence of a completed marriage, they are manifestly proof sufficient of a mutual promise of marriage. The marriage of the parties is the true onerous cause of the deed, and not the conveyance of property, which may be all on one side (*b*). (2.) Where, again, the contract is postnuptial, the completion of the marriage will be stated, and the wife will bind herself, with the consent of her husband. (3.) Persons who have attained the age of puberty may lawfully contract marriage (*c*); and where either party is minor, the father or other legal guardian, if there be such, must join as a consenter in order to validate the conveyance of the minor's heritage. Such consent, however, will not exclude the plea of minority and lesion at the instance of the minor as to provisions contained in the contract in favour of third parties, *e. g.* the relations of one of the spouses; but it is not relevant to infer lesion that there is an undue proportion between the tocher and the husband's property, and a minor may competently provide his spouse in the liferent of his whole estate. Enorm lesion may however be inferred by an unusual destination of the property of one of the spouses, *e. g.* where the wife has made a conveyance to the husband without retaining her own liferent (*d*).

(*a*) It is CONTRACTED AGREED AND MATRIMONIALLY ENDED betwixt A. on the one part and B. on the other part as follows viz. the said parties have agreed to accept and hereby accept of each other for lawful spouses and BIND AND OBLIGE themselves to solemnise their marriage with all convenient speed in usual form.
(*b*) See Wightman, 30th July 1777, M. 9201.
(*c*) Ersk. 1. 7. 34-38.
(*d*) Ersk. 1. 7. 38; Davidson, 4th July 1632, M. 8988; M'Gill, 22d Nov. 1664, M. 5696.

294. DISPOSITIVE CLAUSE (*a*).—This clause is employed to express the destination of the heritage which both or either of the spouses is possessed of, or may receive from a relation. The nature of the conveyance is of course mainly influenced by the extent of the property. If it is a considerable family estate, the object of the parties will in most instances be to have it settled upon the heir-male of the marriage, and failing him, of the heir-male of any subsequent marriage of the party to whom the estate belongs, either in the form of a destination or a strict entail. A conveyance of the nature of a simple destination, under a reserved power to make an entail, is exemplified in the form given in the notes. The other spouse is, in this case, usually provided with the liferent of the lands, or a mere liferent annuity. In the form to which reference is made, the estate is assumed to belong to the husband. Where, again, it is the wife's, the conveyance will be by her; and if both spouses are possessed of land property, the dispositive clause will be mutual, sometimes only one of the estates being provided to the eldest, the other being destined to the second son of the marriage, with the usual substitutions (*b*). To provide for the disjunction of the estates in case of the existence of only one son, a clause may be introduced, in the terms expressed below (*c*).

(*a*) IN CONTEMPLATION of which marriage and in consideration of the provisions in his favour herein-after written the said A. hereby DISPONES AND CONVEYS to and in favour of himself and the heirs-male of the said intended marriage whom failing to the heirs-male to be procreated of his body in any subsequent marriage whom failing to the heirs-female of this intended marriage or any subsequent marriage whom failing *(any other intended substitutes)* whom all failing to the said A. his heirs and assignees whomsoever the eldest heir-female throughout the whole course of the succession of females excluding heirs-portioners and succeeding always without division heritably and irredeemably ALL AND WHOLE *(the lands)* together with all right title and interest which the said A. has or can pretend to the same or any part thereof RESERVING to the said A. full power to execute a strict entail under the statute anent tailzies passed in the year 1685 of the whole or any part of the lands and estate above described provided always that he shall in such entail first call to the succession the heirs and persons above mentioned in the order of the foresaid destination and thereafter such other heirs as he shall think proper.

(*b*) Jurid. Styles, 1. 184.

(*c*) And it is hereby expressly PROVIDED AND DECLARED that in case the second or failing him the younger son of this marriage who hath succeeded to the lands and estate of the said B. under the provision above expressed, shall there-

after succeed to the foresaid lands and estate of the said A. then and in that case the foresaid lands and estate of the said B. shall fall and devolve to the next younger son of this present marriage and the heirs-male of his body in whose favour the elder brother so succeeding to the lands and estate of the said A. shall be obliged to denude of the foresaid lands and estate of the said B.; and failing any such younger brother and the heirs-male of his body the younger son so succeeding to the lands and estate of the said A. as aforesaid shall denude of the said other lands and estate in favour of his own second son whom failing his younger sons and the heirs-male of their bodies in their order whom failing in favour of the daughters of this present marriage in their order excluding heirs-portioners and of the heirs-male of their bodies whom all failing in favour of the person who shall at the time be entitled to succeed to the said lands and estate of the said A. failing the nearest and lawful heir of the said younger son.

295. CONJUNCT FEE AND LIFERENT.—1. *Terms of destinations to the spouses and the children.*—When the property is not of the description of a family estate, it is usual to settle it on the spouses, and the heirs or bairns and children of the marriage. The structure of such destinations is of considerable intricacy. In family questions, the terms, *conjunct fee and liferent*, used with relation to feudal rights, and the *quasi feuda* of bonds, have a sense materially different from that which they bear in conveyances to strangers. They import a fee, absolute or fiduciary, in the person of one of the spouses, more generally the husband, according as they are used, and even a liferent in words often imports a right of fee. (1.) Thus, as a conveyance *to the husband and wife in conjunct fee and liferent, or to both or either of the spouses in liferent simply, or for liferent right and use, and to the heirs of the marriage in fee*, cannot vest a fee in heirs who have no existence, the presumed intention is to leave the fee with the husband as head of the family, (or the spouse expressly pointed out,) a presumption supported by the feudal necessity that the fee should vest somewhere, as it cannot be *in pendente* (*a*). (2.) But this extreme nicety of construction is excluded by the use of the taxative word *allenarly* or *only*, or some equivalent expression, to restrict the right of the parent to a mere liferent; and in that case the feudal difficulty in regard to the vesting of the fee is removed, by supposing a fiduciary fee, *(fides commissaria,)* in the parent for behoof of the children *nascituri*, which accresces to the heir of the marriage on his birth (*b*). (3.) Where, again, the conveyance is made to the

spouses *in conjunct fee and liferent*; or to both or either *in liferent; and to children in existence in fee*—forms applicable to a postnuptial contract; if that existence be feudally declared, by introducing their names in the dispositive clause, the difficulty has no place, and the right of the parents is a naked liferent (*c*). The same rule holds where the right is taken to the spouses in liferent, and to certain children *nominatim*, and to those who shall be thereafter procreated, equally among them, in fee, those named taking the fee subject to a claim in the unborn fiars, if any shall exist, for their share (*d*); and a reserved power of disposal, although conferring the substantial right of property, does not retain the feudal fee of the subject in the parent (*e*). But if the conveyance in a postnuptial contract be to the parents in conjunct fee and liferent, (and not in liferent merely,) with a reserved faculty to convey and burden the lands at pleasure, and to a child or children *nominatim*, or to the issue of the marriage *natis et nascituris*, in fee, without a restrictive term, the matrimonial becomes a feudal fee by force of the reserved powers, and the father, under this form of words, is therefore absolute proprietor of the subjects (*f*). A material distinction here maintains between the terms *in liferent*, and *in conjunct fee and liferent*. (4.) The right of the parent may be restricted to a liferent by means of a trust for behoof of the spouses, and their children although unborn, in liferent and fee, or words which clearly exclude the presumption in favour of the parent's right of absolute fee. Thus, if one in his son's marriage-contract obliges himself to employ a sum of money in the purchase of land, and to take the rights to trustees for the husband in liferent, and the heirs-male to be procreated of the marriage in fee, the husband has a liferent only (*g*). And a similar construction is put on a clause whereby persons are appointed to see the terms of the destination implemented (*h*). Thus, in like manner, the words *liferent alimentary* restrict the right in the husband (*i*). In questions of this description money provisions in contracts of marriage seem to follow the same rules as heritage (*k*).

2. *Practical rules.*—But although equivalents are admitted to limit the powers of the husband or wife in such destinations, the plain duty of the conveyancer is to employ the

words of style. The following rules seem to be established: (1). A conveyance *to A. and B. spouses, and the longest liver, in conjunct fee and liferent, for their liferent use allenarly, and to the heirs of the marriage in fee*, gives the spouses a right of liferent only, and the father a fiduciary fee for the heir of the marriage. These terms, therefore, may be employed when it is intended that the property shall not be in the father's power of disposal, or affectable for his debts. The same end may, it is thought, be attained by making the husband *in name*, instead of merely *in law*, a trustee for the children (*l*). (2.) It follows that the terms above expressed, exclusive of the taxative word *allenarly*, import not a liferent only, but an absolute right of fee in the husband. These may be used, therefore, where it is not intended to debar the father's power of onerous disposal. (3.) When children are in existence, as in the case of a postnuptial contract, the following terms may be used: *To A. and B., spouses, and the survivor, in conjunct fee and liferent, (or in conjunct liferent,) for their liferent use allenarly, and to C. and D., their children, and the other children to be procreated of the marriage, in fee.* The use of the word *allenarly*, although perhaps not essential, removes all ambiguity. (4.) The right conferred on the wife by the terms under consideration is that of a liferent contingent on her survivance. If it is intended that she shall have the fee, the husband a bare liferent, and the children a *spes successionis*, the destination may be thus expressed: *To and in favour of A. and B. spouses, in conjunct fee and liferent, for the said A. his liferent use allenarly, and to the heirs of the marriage in fee.* (5.) It is to be observed, that the effect of the taxative word allenarly used in a destination in conjunct fee and liferent, and to the heirs *nascituris* in fee, will be controlled by a reserved power to the husband or wife to dispose of the property, the right in the parent becoming thereby absolute (*m*). (6.) In destinations in marriage-contracts, the terms *heirs, heirs and bairns, heirs to be lawfully procreated of the wife's body or of the marriage, heirs or bairns, heirs or children one or more*, are interpreted in reference to feudal subjects, and *quasi feuda*, to mean the heir in heritage, if it cannot be discovered from the context that the intention of the parties was to give the property equally among them (*n*). But when the purpose can be gathered from the deed, it is a

quæstio voluntatis. Thus, where the father reserves a power of division, and to apportion the shares of the children, the presumption is that the whole is not intended for the eldest son, or his heir (*o*). (7.) The terms *bairns and children, bairns of the marriage,* or *child or children,* on the other hand, exclude the heir as such, and include all the issue of the marriage (*p*), unless the words, *besides the heir,* or an equivalent expression, be employed; but terms of this import will exclude heirs-portioners from the benefit of the provision in a question with creditors (*q*). (8.) When it is intended that the subject shall descend undivided, heirs-portioners will be excluded by the terms, *the eldest daughter or heir-female always succeeding without division, to the exclusion of heirs-portioners.*

(*a*) Frog, 25th Nov. 1735, M. 4262; Lillie, 24th Feb. 1741, M. 4267; Douglas, 7th July 1761, M. 4269; Cuthbertson, 1st March 1781, M. 4279; Lindsay, 9th Dec. 1807, M. App. *Fiar,* No. 1; M'Donald, 14th Jan. 1831, F. C., 9 S. 269. See Dirleton, *v. Fee;* Dewar, 5th Feb. 1821; affirmed, W. S. 1. 161; Kennedy, 19th Feb. 1825, 3 S. 554.

(*b*) Newlands, 9th July 1794, M. 4289; Thomson, 9th July 1794; Bell, 72; Watherstone, 25th Nov. 1801, M. 4297; Falconer, 20th Jan. 1825, F. C., 3 S. 455; Rollo, 28th Nov. 1832, F. C., 11 S. 132.

(*c*) Boyd, 28th June 1774, M. 3070; M'Intosh, 28th Jan. 1812, F. C.

(*d*) Dykes, 3d June 1813, F. C. See Macdonald, as in (*a*).

(*e*) Baillie, 23d Feb. 1809, F. C.; Wilson, 14th Dec. 1819, F. C.; Steele, 23d Jan. 1823, F. C., 2 S. 146.

(*f*) Wilson and Steele, as above.

(*g*) Seton, 6th March 1793, M. 4219. See Watt *v.* Ewan, 10th July 1828, F. C., 6 S. 1125; Nelson *v.* Corners, 1781; Sandford on Succession, 1. 231.

(*h*) Mein, 8th July 1827, F. C., 5 S. 779; affirmed, 4 W. S. 22.

(*i*) Gerran, 14th June 1781, M. 4402.

(*k*) Gerran, as in (*i*); Williamson, 28th June 1828, F. C., 6 S. 1035; Rollo, as in (*b*).

(*l*) Jurid. Styles, 1. 212. See Dirleton, *v. Fee;* Gibson, 4th Feb. 1726, M. 12,885.

(*m*) See cases in (*b*).

(*n*) Fairservice, 17th June 1789, M. 2317; Dollar, 4th Dec. 1792, M. 13,008; Reid, 18th Nov. 1788, M. 14,483; Bowie, 23d Feb. 1809, F. C.; Duncan, 9th Feb. 1813, F. C.

(*o*) Scot, Feb. 1684, M. 12,842; Wilson, 1st Dec. 1769, M. 12,845; Hailes, 1. 313.

(*p*) Ersk. 3. 8. 48; Duncan, as in (*n*); Hay, 17th Feb. 1663, M. 12,839; Carnegie, 13th Feb. 1677, M. 12,840; Kinloch, 21st Jan. 1678, M. 12,841; Brown, 21st July 1680, M. 12,842; Bryce, 23d June 1786, M. 13,042; Pollock *v.* Waddell, 19th June 1828, F. C., 6 S. 999. See Pringle, 21st Jan. 1741, Elch. *Mut. Cont.* 15; M. 11,446-9; reversed, Cr. and St. 1. 297.

(*q*) See Boyd, 6th Jan. 1670, and 20th Dec. 1671, M. 12,854.

296. CONVEYANCES WITH SUBSTITUTIONS.—1. *Reasons for an express substitution.*—(1.) The examples given in § 295, relate to destinations to the spouses, or one of them, in fee and liferent, and to the issue of the marriage. Under such a destination, the property, on the failure of heirs of the marriage, will devolve to the heirs of the party who is accounted fiar, or revert to the granter when no fee belongs to either of the spouses. Thus, a subject conveyed to *A. and B., spouses, and their heirs*, although coming from the wife's relations, belongs, on the failure of issue of the marriage, to the husband. (2.) It is therefore usual to substitute other heirs to the heirs of the marriage, and the terms of the substitution may influence the question, which if the spouses is to be considered as fiar. This question may be of considerable importance, for the reason, that a different rule prevails with respect to the powers of the fiar in dealing with a mere substitution or simple destination, from that which regulates a conveyance to children unborn. These last, it has been seen, have a *spes successionis*, which can be defeated for onerous causes only; but the right in substitutes who are strangers, *e. g.* the heirs whatsoever of either of the spouses, or the heirs of a subsequent marriage, may be cut off by a gratuitous conveyance; (above, § 248.)

2. *Clauses with substitutions.*—In framing clauses with substitutions, care must therefore be taken to give the fee where it is the intention of parties that it should vest, as the rules of construction are somewhat arbitrary. For example, under a destination *to the husband and wife, and longest liver of them two, in liferent or conjunct fee, and the heirs between them, whom failing, the wife's heirs and assignees whomsoever*, the fee was held to be in the husband (*a*). But in a case precisely similar an opposite decision was given (*b*). The interpretation of such clauses seems, *in dubio*, to depend on these particulars: *first*, whether the subject flowed from the wife or her friends; *secondly*, whether it came as tocher; and, *thirdly*, whether the heirs first called in the substitution, after the heirs of the marriage, are those of the husband or the wife. In the first case, the presumption is in favour of the wife's right of fee, and in the second of the husband's; but in the last, the result may depend on the occurrence of one or other of the two for-

mer circumstances, or other matters extraneous to the mere form of expression (*c*). It is advisable, therefore, to employ terms which leave no room for discussion, as to the rights of the spouses; (below, Art. 3.)

3. *Practical rules.*—(1.) When it is intended, therefore, that the property shall belong absolutely to the wife, failing heirs of the marriage, the clause may be framed thus, *To A. and B., spouses, in conjunct fee and liferent, for the said A., his liferent use allenarly, and the heirs-male of the marriage, and the heirs whatsoever of their bodies in fee; whom failing, to the heirs-male of the said B. in any subsequent marriage, and the heirs whatsoever of their bodies; whom failing, to the heirs-female of the intended marriage, and the heirs whatsoever of their bodies; whom failing, to the heirs and assignees whomsoever of the said B.* (2.) The omission of the special liferent to A. and the substitution to B.'s heirs and assignees, will give the fee to the husband. (3.) If the fee is to belong to the survivor of the spouses, failing heirs of the marriage, the terms may be, *to A. and B. spouses, and the longest liver, and the heirs of the longest liver.* It is proper to frame the clause as here expressed, in order to exclude all doubt as to intention; for although later authorities (*d*) interpret the words, *to A. and B., spouses, and the longest liver and their heirs,* in favour of the wife's right of fee in the event of her survivance, the old construction was different (*e*); and from the result of a recent case, it would seem that the clause, in this latter form, will be interpreted according to circumstances (*f*). (4.) The terms, to *A. and B., spouses, and their heirs,* give the fee to the heirs of the husband (*g*). (5.) But under these several forms, the fee, and consequently the power of disposal, is in the husband, during his lifetime. In order to restrict his right to a liferent, the clause may be conceived in favour of the spouses, in conjunct liferent allenarly, and to the survivor or longest liver, and their heirs, or the heirs of the survivor, in fee (*h*).

(*a*) Gairns, 12th July 1671, M. 4230. See Crs. of Eliot, July 1720, M. 4244.

(*b*) Angus, June 1733, M. 4244; Fead Drover, 4th Feb. 1709, M. 4240.

(*c*) Wordie, 18th July 1750, M. 4207; Bruce Henderson, 20th Jan. 1790, M. 4215. See Sinclair, 20th Nov. 1771, M. 4241.

(*d*) Ersk. 3. 8. 36; Ferguson, 22d June 1739, M. 4202; Riddells, 6th Nov. 1747, M. 4203; Boyd, 22d Nov. 1749, M. 4205.

(*e*) Stair, 2. 6. 10; Justice, 23d Jan. 1668, M. 4228.

(*f*) Murray, 19th May 1826, F. C., 4 S. 589. See Macgregor, 3d June 1831, 9 S. 675.

(*g*) Stair, as in (*e*); Ersk. as in (*d*); Jurid. Styles, 1. 123.

(*h*) See Macgregor, as in (*f*).

297. OBLIGATION TO CONVEY.—The property of the spouses is sometimes settled in the form of an obligation to convey, or to take the rights of the subjects *to and in favour of the spouses in liferent and conjunct fee, and the heirs of the marriage in fee.* This shape of the clause gives the eldest son a mere *spes successionis*, a hope of succession, as an heir of provision. The addition of the word *allenarly*, and a specific term of implement, as in the notes (*a*), confers a proper *jus crediti*, which makes the heir his father's creditor, in place of his successor, and entitles him to compete with creditors, whose debts have not been made real burdens on the property, or insist for implement by means of diligence (*b*); (below, § 298 and 312.) An obligation to convey is the proper form where the property belongs to a relation. But when the relation (*e. g.* the father of either of the spouses) intends to confer an immediate and absolute right on the spouses, and the children of the marriage, this may be done as explained in § 295.

(*a*) IN CONTEMPLATION of which marriage the said A. BINDS and OBLIGES himself his heirs and successors against the term of next to make due and lawful resignation of the lands and others particularly herein described in the hands of his immediate lawful superiors of the same in favour and for new infeftment thereof to be made and granted to the said A. and B. in conjunct fee and liferent for their liferent use allenarly and the heirs-male of the said intended marriage in fee whom failing, &c.

(*b*) Ersk. 3. 8. 39; Falconer, 20th Jan. 1825, F. C., 3 S. 455.

298. CONTROL OF THE FATHER.—(1.) Where the estate is destined to the heirs of the marriage, their *spes successionis* cannot be gratuitously defeated (*a*). The father may sell the lands, and they remain affectable for his debts; but he cannot alter the destination, by excluding the heir of the marriage although he should turn out extravagant or become insane, or heirs-portioners; preferring another child of the marriage

to the issue or the creditors of the heir; selling the property and dividing the price among the younger children; making irrational additions to their provisions; discharging a restriction of the liferent of the wife; limiting the right of the heir by restrictions not authorised by the contract; or the like (*b*). All these are examples of gratuitous alienation or alteration. (2.) But the father is not barred from implementing the contract, by giving a *de præsenti* absolute conveyance to the existing or presumptive heir of the marriage, so as to exclude the chance of succession of the other children, or going beyond the terms of the contract, by substituting other heirs to those of the heir of the marriage (*c*). (3.) It may be considered advisable by the spouses to reserve a power to the father to exclude the heir of the marriage, at his discretion, or in certain specified events (*d*). (4.) Power is sometimes reserved to execute a strict entail of the lands, without which it is *ultra vires* of the spouse to whom they belong to alter a fee-simple destination to the heirs of the marriage (*e*); and such reservation, if not conceived in general terms, must include all the essential prohibitions. Thus, a power reserved to make an entail, prohibiting alienation and the contracting of debt, will not sanction a clause restraining the heir from altering the course of succession; nor a power to impose fetters for protecting the destination enable the husband to add to it (*f*). But the concurrence of the existing or presumptive heir, when of full age, will supply the want of power in the father; for as he may discharge, so can he restrict his right under the contract (*g*).

(*a*) Ersk. 3. 8. 38-9.

(*b*) Ersk. 3. 8. 38; Bell's Princ. 1967, and auth. cit.; Carnegie, 10th July 1677, M. 12,840, 12,888; Stewart, 4th June 1743, Elch. *Mut. Cont.* 20, Cr. and St. 1. 364; Speirs, 28th July 1778, M. 13,026. See Stewart, 2d March 1815, F. C.

(*c*) See Sandford on Succession, 1. 247; Traill, 7th Jan. 1737, Elch. *Mut. Cont.* 5, M. 12,985; Craik, 7th Dec. 1728, M. 12,984; Nisbet, 25th July 1738. Elch. *Mut. Cont.* 9, M. 12,986.

(*d*) Jurid. Styles, 1. 195-6.

(*e*) Strang, 17th July 1751, M. 12,988, Elch. *Tailzie*, 42; Douglas, 25th July 1751, M. 12,989; Elch. *Tailzie*, 43; Monro, 13th Feb. 1810, F. C. See Douglas, 5th Dec. 1804, M. App. *Fiar, absol. and limit.* No. 1.

(*f*) M'Neill, 27th Jan. 1826, F. C., 4 S. 393.

(*g*) Bell's Princ. 1970.

299. RIGHTS OF HEIRS OF THE MARRIAGE.—1. *Nature and extent.*—Connected with that of the father's powers under the contract, is the question, of what nature and extent is the right conferred on the heir of the marriage by the ordinary form of the destination. (1.) It has been explained, (above, § 248,) that substitutes in the situation of strangers, not having the benefit of a prohibitory clause, have but a bare expectancy, which gives no right of action or diligence, and may be gratuitously defeated. But heirs of a marriage have, in all cases, a *spes successionis*, which grounds a claim against the father's separate estate or funds, in the event of his disappointing the destination by onerous deeds, even without a prohibitory clause, although it is not a title in competition with creditors, even when followed by inhibition, which does not deprive the father of the fee (*a*). *Jus crediti*, again, is properly the right conferred not by an express destination, but by an obligation prestable by the father during his lifetime, to convey or take the rights of a subject to the heirs of the marriage, and is a ground of action or diligence against the parent to implement the obligation, and a title in competition with creditors, where express implement would have secured the lands absolutely to such heir; (see below, § 312.) (*b*). (2.) Whether the right be of the one nature or the other, it vests without service (*c*); but the validity of an assignation depends upon the quality of the right. If it is a right the implement of which will make the heir absolute fiar during the lifetime of the father, such from its nature is transmissible by assignation; but if a mere *spes successionis*, assignation will only have effect on the survivance of the heir (*d*).

2. *Heir may discharge.*—(1.) But although the heir or a child of the marriage cannot transmit his *spes successionis* to another unless clogged with the condition of survivance, he may validly discharge, in favour of his father, his right under the contract. Put the case of a conveyance to the spouses in conjunct fee and liferent, and the heirs of the marriage in fee, and that the wife predeceases. Here the eldest son in life having in his person a *spes successionis in obligatione*, it has been held that the father as fiar may vest the heir ex-

pectant, or existing heir of the marriage, with an absolute right to the fee, and thereby implement the obligation in the contract (*e*). A technical meaning is thus given to the term heir of the marriage, which would otherwise import the individual who possesses the character of heir at the father's death. But if the father can thus disappoint the expectancy of the younger children by an express conveyance to the eldest son, whereby the son becomes absolute proprietor, and may dispose of the estate at his pleasure, there is plainly no obstacle to his reconveying it to his father. And it follows that this circuitous transaction has just the effect, and no more, of a discharge and renunciation by the son to the father of his right under the contract. Such, accordingly, is a valid mode of yielding back that right, and the renunciation is effectual, notwithstanding the predecease of the heir (*f*). (2.) The effect of this doctrine is to place additional power in the hands of the father, who, by using a threat of selling the property, may induce the eldest son to discharge the marriage-contract, and thus defeat not only his own right but the expectancy of the younger children. It is not easy to devise a clause (*g*) effectual to exclude this power in the father and faculty in the son; but perhaps the object may be accomplished by a declaration, that *the term heir of the marriage, as used in these presents, shall import the individual possessing the character of heir of the intended marriage on the death of the husband and none other*, or by providing the lands not to heirs of the marriage generally, but *to the eldest son or heirs of the intended marriage alive at the death of the husband.* Such words, it is thought, would in no respect alter the nature of the right in the children. It is on the supposition a mere expectancy, which can be defeated by onerous, although not by gratuitous deeds.

(*a*) Gordon, 3d June 1748, M. 12,915; affirmed on ap., 7th March 1751.

(*b*) Ersk. 3. 8. 29; Falconer, 20th Jan. 1825, F. C., 3 S. 455. See Brown, 1st Feb. 1820, F. C.

(*c*) Ersk. 3. 8. 73; Bell's Princ. 1969.

(*d*) M'Conochie, 12th Jan. 1780, M. 13,040.

(*e*) Trail, 17th Jan. 1737, M. 12,985; Munro, 19th March 1760, B. S. 5. 880; Fotheringhame, 2d June 1797, M. 12,991.

(*f*) Routledge, 19th May 1812, F. C.; Majendie, 16th Dec. 1819, F. C.; affirmed, Dow, 4. 392. See Threipland v. Sinclair, 13th Feb. 1770, n. r.
(*g*) See Jurid. Styles, 1. 196-7.

300. OBLIGATION TO INFEFT.—Where the conveyance is *de præsenti* and special, the obligation will be alternative, in the ordinary form. But if the party bringing the estate is uninfeft, a clause or procuratory is introduced, authorising certain persons, usually men of business, to complete the title, which, when made up, will accresce to the infeftment given under the contract (*a*). Where, again, there is property in expectancy, a clause, which is generally added at the end of the procuratory of resignation, will provide the estate to the heir of the marriage, the second son, or equally among the bairns and children, according to the wishes of the parties (*b*).

(*a*) See forms Jurid. Styles, 1. 181-2.
(*b*) Jurid. Styles, 1. 180.

301. PROVISIONS TO THE WIFE OR HUSBAND.—The wife, by accepting a provision secured over lands, is held to have renounced her legal provision of terce (*a*), unless reserved to her in express words. It is advisable to introduce a declaration, that on the provision becoming ineffectual from whatever cause, the widow may recur to her legal rights. But, on the other hand, the husband's right of courtesy is not excluded by his accepting a provision, however valuable; and therefore, when it is not intended that he shall enjoy both his legal and conventional provisions, the courtesy must be expressly renounced (*b*). A short account of the nature of these rights may not be out of place here.

(*a*) 1681, c. 10. OUR SOVERAINE LORD CONSIDERING that sometimes through the ignorance and inadvertencie of some writters and nottars, clauses are insert in contracts of marriage, containing provisions by husbands in favour of their wives, without mentioning the terce that is due to her by law, or expressing the provision to be granted in satisfaction of the terce; whereby occasion is given to relicts to claime a terce out of their husbands' estates by and attour the provision conceived in their favours, contrary to the meaning and intention of the parties contracters. For remeid whereof the King's Majesty with advice and consent of the Estates of Parliament STATUTES and ORDAINS that in time coming where there shall be a particular provision granted by an husband in favours of his wife, either in a contract of marriage or some other writ, before or after the

marriage, that the wife shall be thereby secluded from a terce out of any lands or annualrents belonging to her husband, unless it be expressly provided in the contract of marriage or other writ containing the said provision, that the wife shall have right to a terce by and attour the particular provision conceived in her favours: But prejudice always to the Lords of Session to determine as to contracts of marriage or provisions already made according to the former law and custom.—Stair, 2. 6. 17; Ersk. 2. 9. 45.

(*b*) Bell's Princ. 1948.

302. TERCE (*a*).—1. *Introductory remarks.*—Terce may be defined, the right of a widow to the liferent of a third of the heritable subjects in which her husband died vested and seised, after deducting the annualrent of the real burdens imposed on them by law or by the act of the deceased; and as a right of liferent, it must be exercised *salva substantia* (*b*). Its origin is ascribed by Mr Erskine to the natural right which a wife has to a settlement out of her husband's estate in the event of her survivance (*c*). It obtained by our most ancient customs, and was a third of the heritage in which the husband was infeft at the time of the marriage, which he had no power to increase (*d*). In course of time, when conventional provisions were introduced, it became usual to give the wife a liferent infeftment to such an amount as to equal, if not exceed the terce, in order to avoid the forms of making the legal provision effectual; and when the conventional happened to exceed the legal liferent, it was "always retrenched "into the terce" (*e*). But it seems to have been attempted to claim both provisions, unless where it was expressly conditioned in the marriage-settlement that the conventional provision was granted and accepted in full of the former,—a pretension too exorbitant for the gallantry of the age (*f*). And it would appear that a demand of this nature against the husband's heir, exceeding the one half of his estate, was the proximate cause of the statute of 1681 (*g*), which substituted conventional provisions made in favour of the wife, in place of the legal provision of the terce (*h*).

2. *When due.*—Terce may be claimed when the marriage had subsisted for a year and a day, or produced a child which was heard to cry (*i*); and the rule holds, although the child had been born before the declaration of the marriage (*k*).

3. *What subjects it affects.*—Terce, as a general rule, is due out of all heritable subjects and rights in which the husband died infeft, his sasine being the measure of the right, but not where the substantial right of fee belongs to a third party, *e. g.* a nominal liferenter having a power of disposal (*l*). (1.) In particular, it is due out of lands and the pertinents of lands, houses and other buildings (*m*). It is in express terms stated by Mr Erskine, that when the husband dies possessed of two mansion-houses or country seats, the widow is entitled to the second; but doubts have been expressed of the soundness of the opinion (*n*). Where there is only one, terce is not due if the heir choose to occupy it; otherwise the widow's right to reside in it, paying two-thirds of a reasonable rent, has been recognised. In a later case, she was found entitled to the terce of the mansion-house and garden (*o*). (2.) Terce is due out of real securities by infeftment (*p*); but it has been doubted if these include burdens by reservation (*q*). A distinction may perhaps be drawn between burdens, in relation to which the infeftment of the disponer is expressly reserved (*r*), and those created in the form of real liens in favour of third parties, which merely burden the infeftment of another; (§ 136.) (3.) It affects tenements and houses in villages, and in burghs of regality and barony, and even in burghs royal, if not held by the tenure of burgage (*s*).

4. *Exceptions.*—The subjects which terce does not affect are superiorities, and consequently the duties attaching to them (*t*); reversions prior to redemption (*u*); patronages, as indivisible (*v*); leases, as not feudal (*w*); coal, and perhaps the products of other mines, as being part of the soil and not its annual increase (*x*); teinds, unless where there is an infeftment in them by erection (*y*); and subjects held in burgage (*z*).

5. *How excluded.*—(1.) Terce is excluded by a special provision, granted by the husband in a contract of marriage or other writ, whether in contemplation or after the celebration of the marriage (*aa*). The statute plainly imports that the provision shall be equally valuable as the terce; but the acceptance by the wife of a provision, of whatever amount, as in lieu of terce, implies a discharge of the legal

liferent (*bb*); and it would appear that it does not revive, in the event of the conventional provision becoming unavailable (*cc*). A distinction may perhaps maintain between a conventional provision, thus expressly accepted as in place of the terce, and one accepted simply, which is less than the legal provision. When the right to the terce is expressly reserved in the deed granting the provision, the statute establishes an exception in favour of the widow; and even where the intention of the husband not to exclude the terce is plain, it will receive effect. But the wife cannot qualify her acceptance of a conventional provision, by a reservation of her right to the terce, without the consent of the husband, although she may take or reject the provision at her pleasure (*dd*). (2.) Terce is excluded by infeftment in favour of a purchaser, adjudger, or *bona fide* disponee, or by resignation *ad remanentiam* duly completed prior to the husband's death; but not by a conveyance or adjudication which remains a personal right (*ee*). It is said that the sasine of the disponee or adjudger must be duly registered prior to the husband's death; and this seems in accordance with the principle, that the husband's sasine is both the measure and security of the terce, which can therefore be affected by such rights only as exclude his sasine (*ff*). (3.) The terce of the widows of heirs of tailzie may be excluded by an express clause in the deed of entail, and that although the destination be not fenced with the statutory irritancies. But it seems not to admit of doubt, that the restrictive declaration must appear in the sasines of the members of tailzie. It follows, perhaps, that as a tailzie without irritant and relative clauses is a mere destination, the terce may be effectually excluded in an ordinary deed of settlement (*gg*).

6. *How restricted.*—(1.) Terce is restricted by real burdens, whether by constitution or reservation, duly completed by a sasine registered before the husband's death (*hh*); but the principal sums are not brought into computation, so as to affect the terce, which is a third of the free rents; and when rent is derived from subjects, such as coal, not affected by the terce, the creditor draws his interest, if it do not exhaust the whole rents, proportionally from the lands and coal (*ii*).

(2.) An absolute conveyance qualified by back-bond does not exclude the terce, but has a mere restrictive effect to the extent of the sums with which the reversion is burdened, whence it may be inferred that terce affects the radical right of one who has granted a trust-conveyance of his estate (*kk*). (3.) Terce is restricted by the teind-duty, unless the widow shall undertake to pay minister's stipend (*ll*).

7. *Not affected by deeds in fraudem.*—(1.) Terce (or at least a provision in lieu of it) is not excluded by deeds granted by the husband *in fraudem* of the right, *e. g.* by his divesting himself of the heritage in which he is infeft, in favour of his heir (*mm*); or by inexcusable delay to feudalise a personal right to lands (*nn*). But in such cases the widow has only a right of action against her husband's representatives. (2.) Nor is it excluded as in a question with the heir of line, by the reduction of the husband's sasine after his decease, on the ground of informality (*oo*). (3.) When lands which are subject to the terce have been sold by the heir, the widow may claim either her liferent of a third of the lands, or indemnification from the heir (*pp*).

8. *Lesser terce.*—If the lands in which the husband died infeft are subject to the terce of the widow of a former proprietor, his widow has right to a third only of the remaining two-thirds, which is styled the lesser terce. It is increased to the full legal extent on the death of the first tercer (*qq*).

9. *How fixed.*—(1.) Terce takes effect at the husband's death. Its extent is ascertained by a brieve (*rr*) directed to the sheriff of the shire where the lands lie. The heads of inquiry are, *first*, Whether the claimant was married to the deceased (*ss*); and, *secondly*, In what lands and annualrents he died last vested and seised. The brieve does not require proclamation, but the forms are in other respects similar to those employed in services of heirs; (see *Entry of Heirs.*) The first head of inquiry is substantiated by evidence that the widow and the deceased were habit and repute married persons; and the second, by production of the sasine of the deceased, or an extract of it from the register. (2.) The widow may afterwards obtain an allotment of a particular portion of the lands (*tt*), by means of a process called kenning, which pro-

ceeds before the Sheriff; but until served and kenned, she has no active title to the rents, or to remove tenants, or defend them against adjudging creditors of the heir (*uu*). This service and process are now almost obsolete. The right of terce is of a nature so indefinite, as to be the source of vexatious disputes between the widow and the heir, which the great number of cases referred to under this head abundantly evince. When it happens that it is not renounced or excluded, the parties generally find it convenient to adjust their differences extrajudicially.

(*a*) See 1681, c. 10, above, p. 403.

(*b*) See Stair, 2. 6. 12, *et seq.* See 1491, c. 25; 1535, c. 15; Bell, 7th Dec. 1827, 6 S. 221.

(*c*) Ersk. 2. 9. 44, *et seq.*

(*d*) Reg. Maj. l. 2. c. 16.

(*e*) Craig, 2. 22. 8; Stair, 2. 6. 16.

(*f*) Ersk. 2. 9. 45.

(*g*) 1681, c. 10, above, p. 403.

(*h*) See La. Craigleith, 25th Jan. 1681, M. 6450.

(*i*) Stair, 2. 6. 17; Ersk. 2. 9. 51.

(*k*) Crawford's Trustees, 20th Jan. 1802, M. 12,698.

(*l*) Cumming, 10th Feb. 1756, M. 15,854.

(*m*) Ersk. 2. 9. 48; Belschier, 30th June 1779, M. 15,863.

(*n*) Ersk. last refer.; Mead, 24th Feb. 1796, M. 15,873.

(*o*) Ersk. as in (*m*); Logan, 26th Jan. 1665, M. 15,842; Montier, 29th June 1773, M. 15,859. See Moncreiff, 9th Feb. 1667, M. 14,844.

(*p*) Ersk. as in (*m*); Bell's Com. 1. 59. See Belschier, as in (*m*).

(*q*) Bell's Princ. 1600.

(*r*) See Wilson, 13th Feb. 1822, F. C.

(*s*) Wallace, 28th June 1649, B. S. 1. 395; Rose, 26th Jan. 1790, M. 15,867; Park, 15th Nov. 1769, M. 15,855; Hailes, 2. 306.

(*t*) Craig, 2. 22. 34; Stair, 2. 6. 16. *et seq.*; Ersk. 2. 9. 49; Glenbervie, March 1541, M. 15,835; Lamington, 14th Feb. 1628, M. 15,840; Dunfermline, 13th Feb. 1628, M. 14,707; Nisbett, 24th Feb. 1835, 13 S. 517.

(*u*) Ersk. last ref.; M'Dougal, 3d July 1801, M. App. *Terce*, No. 2. But see Bartlett, 27th Nov. 1812, F. C.; More's Notes on Stair, ccxvii.

(*v*) Ersk. as in (*t*); D. of Roxburghe, 25th June 1818, F. C.

(*w*) Ersk. as in (*t*).

(*x*) Lamington, 14th Feb. 1628, M. 8240, M. 15,840; Belschier, as in (*m*).

(*y*) Moncreiff, as in (*o*).

(*z*) Craig, 2. 22. 34; Stair, 2. 6. 16; Ersk. 2. 9. 49; Bankton, 2. 6. 11; Mack. 2. 9. 43; Lothian, 10th June 1801, M. App. *v. Annualrent*, No. 2.

(*aa*) 1681, c. 10, above, 403.

(*bb*) C. of Findlater, 8th Feb. 1814, F. C.

(*cc*) Mowat, 9th Feb. 1697, M. 6395.

(*dd*) Jankouska, 29th Nov. 1791, M. 6457; Ross, 20th Jan. 1797, M. 4631, as reversed on ap., M. App. *v. Foreign*, No. 5. See Belschier, as in (*m*).

(*ee*) Bell's Princ. 1600; Carlyle, 9th Feb. 1725, M.15,851; M'Culloch, 10th July 1788, M. 15,866.

(*ff*) Bell's Princ. 1600; Ersk. 2. 9. 46.

(*gg*) Gibson, 24th Nov. 1795, M. 15,869. The *ratio* seems to have been, that as terce is measured by the husband's sasine, it cannot be due where the sasine expressly excludes it. Macgill, 13th June 1798, M. 15,451.

(*hh*) Ersk. 2. 9. 46; Bell's Princ. 1600. See Stewart, 18th May 1792; M. 10,232.

(*ii*) Belschier, as in (*m*).

(*kk*) Bartlett, 21st Feb. 1811, and 27th Nov. 1812, F. C.; More's Notes on Stair, ccxvi.

(*ll*) See Moncreiff, as in (*o*).

(*mm*) Craig, 2. 22. 27; Stair, 2. 6. 16; Ersk. 2. 9. 46.

(*nn*) Last refer. But see Carruthers, 29th Jan. 1706, M. 15,846; More's Notes on Stair, ccxvi.

(*oo*) Rose, 26th Jan. 1790, M. App. *v. Terce*, No. 1.

(*pp*) Bell, 8th Dec. 1825, 4 S. 286.

(*qq*) Ersk. 2. 9. 47.

(*rr*) VICTORIA &c. Vicecomiti &c. SALUTEM Mandamus vobis et præcipimus quatenus dilectæ nostræ B., relictæ quondam A. latrici præsentium haberi faciatis rationabilem tertiam partem suam ipsam de OMNIBUS et SINGULIS terris et annuis reditibus cum pertinen. quæ et qui fuerunt dicti quondam A. sui mariti hæreditarie infra baliam vestram quas et quos de nobis tenuit in capite et de quibus obiit ultimo vestitus et sasitus ut de feodo TANTUM inde facien. quod pro vestro defectu amplius inde justam quærimoniam non audiamus Teste meipsa apud Edinburgum, &c.

(*ss*) 1503, c. 77.

(*tt*) Ersk. 2. 9. 50; Jurid. Styles, 1. 445.

(*uu*) Barclay, 2d Feb. 1675, M. 15,844. See Maxwell, 18th March 1630, M. 15,842.

303. COURTESY.—(1.) This right is one of liferent in the husband of the whole heritage (conquest being excepted) in which the wife died vested and seised, including burgage subjects (*a*). The conditions are, that a child shall have been born of the marriage who was heard to cry, and that the wife had no child existing of a former marriage who succeeds to her estate (*b*). (2.) Courtesy is affected by the same burdens as the terce, and in addition, with the annual interest of the personal debts of the deceased, but subject to a reservation of a right of recourse on subjects not falling under the courtesy. (3.) The wife's sasine is the measure of the courtesy, and if not challenged in her lifetime, when errors might have been remedied, is effectual to support the right of the husband (*c*). He enters into possession without service, or, in other words,

he continues the possession which he had as husband of the deceased.

(*a*) Craig, 2. 22. 43; Stair, 2. 6. 19; Ersk. 2. 9. 54; Paterson, 1st Feb. 1781, M. 3120; Primrose, 10th Dec. 1771, M. App. *v. Courtesy*, No. 1.; Knight, 26th July 1786, M. 8815.

(*b*) Ersk. 2. 9. 52-3.

(*c*) Hamilton, 15th June 1716, M. 3117.

304. PROVISION BY ANNUITY.—(1.) It is obvious from the nature of the legal rights of terce and courtesy, that it is in all cases highly convenient that they should be excluded. The simplest form of a conventional provision is that by liferent annuity constituted in favour either of the husband or wife, as the case may be, when an estate is brought into communion by the other spouse. The form of the necessary clause (*a*) is simple; the fee is provided to the heirs-male of the marriage, and failing them, to the heirs whatsoever of the party to whom the lands belong, and the annuity is made a burden on the conveyance. The previous destination is thus not altered. (2.) A liferent annuity secured, or which the granter has bound himself to secure, over heritage, commencing at the first term after the husband's death, as for the period preceding that term, has been held to expire as at the term immediately preceding the death of the annuitant. It does not run *de die in diem*, like the interest of money, in regard to which there is no question as to a debt, but to whom the debtor must account. Annuities being payable termly, the current annuity, which is only provisionally due, necessarily falls by the party predeceasing the term of payment, although it is without question competent for a husband to declare by proper words of style, that the annuity shall be payable not only *termly*, but *proportionally*, in which case it will run to the day of the annuitant's death. The word *proportionally* or *continually*, is held to be controlled by the obligation to infeft, if it bear only *termly* (*b*).

(*a*) AND FURTHER the said A. hereby BINDS and OBLIGES himself and his heirs succeeding to him in the lands and estate above disponed and his successors whomsoever to make payment to the said B. his promised spouse in case she shall survive him yearly and each year during all the days of her life after his decease of a free liferent annuity of £. exempted from all burdens and de-

ductions whatsoever and that at two terms of the year Whitsunday and Martinmas by equal portions &c.—Then follows an obligation to infeft the wife in security of the annuity and a clause of absolute warrandice. See Jurid. Styles, 1. 175.

(*b*) Ersk. 2. 9. 66; Craig *v.* Colbrooke, 14th May 1835, F. C., 13 S. 756. See opinion of Lord Gillies. See E. of Dalhousie, 19th June 1789, M. 15,915. *The clause in the case of Craig was in these terms:* " A free yearly annuity of L.800 a-year without any deduction whatever during all the days of " her life in case she shall survive me at two terms of the year Whitsunday and " Martinmas by equal portions beginning the first term's payment being L.400 " sterling at the first of these terms which shall arrive next after my death for " the half year immediately preceding that term and so furth thereafter termly " and proportionally during her lifetime with a fifth part more than each term's " payment of liquidate penalty for each term's failure in punctual payment there- " of" *(follows the obligation to infeft)* " to infeft and seise the said B. in the " said free annuity of L.800 sterling yearly during her life in case she shall sur- " vive me to be uplifted and taken at the aforesaid two terms in the year Whit- " sunday and Martinmas by equal portions beginning the first term's uplifting " thereof being L.400 at the first of these terms which shall arrive after my " death for the half year immediately preceding and so furth termly thereafter " during her lifetime," &c.

305. RESTRICTION OF THE ANNUITY.—It may be covenanted between the parties that the wife's annuity shall be restricted in either of these events, the existence of children, or her entering into a second marriage. A restriction in the latter event is usual, since it is to be assumed that the widow will receive a provision from the second husband; but not so in the former. The necessary forms will be introduced after the conveyance of the annuity, and before the obligation to give infeftment to the wife (*a*), which will refer to the restriction.

(*a*) See Jurid. Styles, 1. 197-8.

306. JOINTURE HOUSE.—Where the husband is an extensive proprietor, it is usual to provide the wife in a jointure house, or a sum in place of it. The obligation to give infeftment in a jointure house will be introduced after the warrandice of the annuity (*a*).

(*a*) Jurid. Styles, 1. 201-2.

307. CONQUEST.—1. *What considered conquest.*—A provision of conquest in a marriage-settlement is introduced after

the warrandice of the annuity, and it may be in addition to, or only in security of the principal provision (*a*). (1.) Where the conveyance defines the subjects intended to be given as conquest, it is limited by the definition. In the words of Lord Stair (*b*), clauses of conquest "are interpreted strictly "according to the tenor thereof; for sometimes they only "bear lands conquest, sometimes lands or annualrents, some-"times lands, annualrents or sums of money, and sometimes "also goods or gear." Thus an obligation to infeft a wife in conquest of *lands and annualrents*, extends not to leases which do not require sasine for their completion; but these fall under the term, heritages (*c*). Nor does conquest of *all lands, annualrents, goods and gear*, include bonds bearing date after the marriage, unless the wife shall prove that they were granted for sums or moveables acquired during the marriage (*d*). (2.) Conquest, when not defined, obtains its legal meaning, and includes all subjects, whether heritable or moveable, acquired by industry, economy, purchase or donation; but not such as come by legal or provisional succession, (unless succession be expressed,) or to which a title is obtained by accretion or otherwise so as to render absolute and complete what was formerly imperfect or defective (*e*). (3.) The death of the husband is the period at which conquest is to be computed, and accordingly a lease, of which the term of entry had not then arrived, forms no part of the tenant's conquest (*f*). In marriage-contracts it is usually so provided: and in estimating the amount or value of the conquest, debts are deducted, *e. g.* where an estate is sold, and another purchased in its stead, credit is to be given for the price of the former (*g*).

2. *Effect of a clause of conquest to the wife.*—(1.) Conquest provided to a wife in liferent, remains the property of, and under the power of the husband, unless that power be expressly renounced, and he may grant competent provisions to the children even of the heir of the marriage, if enough remain as a provision for the wife (*h*). (2.) Where, again, conquest is provided to the wife and her relations in fee, *failing children of the marriage*, the power remains with the husband to dispose of it not only for onerous causes, but at his pleasure,

e. g. in providing for a second wife, or the children of another marriage (*i*).

3. *Effect of a clause of conquest to children.*—(1.) A provision of conquest to children is usually conjoined with a similar provision to the wife (*k*). It is interpreted differently in some particulars from a provision of a specific subject. Thus the terms, *heirs or bairns*, import an equal right in all the children (*l*); but in other respects the rules above explained apply; (§ 295. 2.) (2.) A provision of conquest is not to be interpreted as if the father were under a specific obligation to make every subject available that he happens to acquire during the marriage; it has the effect only of restraining him from altering the destination by substituting strangers in the place of the children. Conquest is *nomen universitatis*. The children have a valid claim to the *universitas*, but to no particular subject; and as the father may forbear to purchase, so, after purchasing, he may exercise every right of property, and alter or lessen the *universitas* at his pleasure, although he may not convey it to the prejudice of the children by any merely gratuitous deed without rational cause or consideration. The father having the power of onerous or rational disposal, children have no *jus crediti*, and of consequence the father is not subject to diligence. Rational disposal includes a power of distribution, although not of absolute exclusion (*m*).

4. *Practical rules.*—In preparing clauses of conquest, the conveyancer will thus have in view, the *kind*, the *amount or extent*, and the husband's *powers of control*. (1.) When it is intended to give the wife the liferent of the whole subjects legally embraced by the term conquest, a specification is superfluous. On the other hand, such as it is meant to exclude must be expressed; and if acquisition by succession is contemplated, the same rule applies. (2.) It is advisable so to frame the clause as to declare whether the wife is to liferent the conquest in addition to, or only in so far as it may exceed, her other provisions. (3.) The father's powers of control, although considerable by law, are in the ordinary case expressly reserved to the fullest extent: he will otherwise be in some degree restricted in the disposal of property obtained mainly by his own industry.

(*a*) Jurid. Styles, 1. 202.

(*b*) Stair, 3. 5. 52.

(*c*) La. Dunfermling, 12th March 1628, M. 3048; Duncan, 15th Feb. 1810, F. C.

(*d*) Robson, 15th July 1673, M. 3050.

(*e*) Stair, 3. 5. 52; Ersk, 3. 8. 43; Bell's Princ. 1975; C. of Dunfermling, 12th March 1628, B. S. 1. 252; Wauchope, 6th Feb. 1683, M. 3062; Rae, 23d Jan. 1810, F. C.

(*f*) Duncan, as in (*c*)

(*g*) Ersk. 3. 8. 43.

(*h*) Robson, as in (*d*).

(*i*) Anderson, 28th July and 1st Dec. 1680, M. 12,890.

(*k*) Jurid. Styles, 1. 202.

(*l*) Stair, 3. 5. 52; Allardice, 12th Feb. 1721; Robertson's Ap. 399; Rankin, 17th Feb. 1736, M. 14,931.

(*m*) Bell's Princ. 1977, and auth. cit.

308. WIFE'S POWER TO RENOUNCE PROVISIONS. — It is much to be desired that an effectual clause were devised for preventing the discharge or renunciation by a wife of her conventional provisions, either directly or by consenting to heritable securities over the estate. A clause substantially the same as that suggested in the Style-book (*a*), which resolves into a species of interdiction, has been regarded as effectual, and it will not bar the widow from conveying her jointure to trustees, for behoof of herself and the children of a second marriage, to the exclusion of the husband's *jus mariti* (*b*).

(*a*) Jurid. Styles, 1. 203.

(*b*) See Murray's Trustees, 5th Feb. 1745, M. 2273 and 5842.

309. PROVISION TO WIFE OVER ENTAILED SUBJECTS.—1. *By annuity.*—Hitherto it has been assumed that the lands to be burdened with provisions are possessed in fee-simple. Where a provision by annuity is granted under powers contained in a deed of entail, the contract has no dispositive clause. The clause of annuity will be framed in strict conformity with the entail (*a*); and although the law will make the necessary restriction (*b*), it is usual to introduce a declaration by way of saving clause, to the effect that the provision shall not infringe on the entail, but shall in all events be limited to the precise amount authorised by the entail.

2. *By way of locality.*—Deeds of entail most usually

authorise provisions to the wife to be granted by way of locality, in other words, by infeftment in certain specified subjects localled and set aside for her liferent use. These receive the name of locality lands; (above, § 275.) This kind of provision is equally applicable to the case where the estate is held in fee-simple. The contract will contain an obligation to give infeftment to the wife in certain lands which are fully described, subject to payment of the public burdens due out of them, with clause of warrandice, assignation to the rents, &c. and a precept of sasine. (1.) Where the estate is unentailed, the clause providing the wife in a locality precedes the conveyance to the heir of the marriage, which will be made under burden of the liferent constituted in favour of the wife. (2.) If again the lands are entailed, and it is necessary, from the terms of the entail, or convenient from other causes, to restrict the value of the liferent locality to a fixed annuity, the wife may come under an obligation to grant a tack of the locality lands to the heir of entail at a specified rent, under a provision, that if the rent is not regularly paid she may recur to the lands themselves (*c*). When locality lands are set apart without due inquiry into their value, power may be reserved to the wife of choosing other lands in their stead, and an obligation imposed on the husband to execute the necessary deeds for that purpose. (3.) An important distinction obtains in estimating a provision of so much of the free rent of the estate, and the value of lands over which a fixed annuity is to be secured. A provision of the former kind has reference to the rent of the year current at the period of the granter's death (*d*), as that in which it is to take effect; whereas, in a grant by infeftment in locality lands in security of a fixed annuity, the rent of these lands at the date of the grant is the rule, unless the matter be expressly regulated by the terms of the entail, or when the provision has been granted *mortis causa*, so that the husband or wife will thus benefit by a rise or suffer from a fall in the value of the locality lands (*e*). (4.) A widow having right to the profits of locality lands cannot suffer by a conventional arrangement of the terms of payment made by the heir with the tenants of those lands (*f*).

3. *Under Lord Aberdeen's Act.*—When the deed of

entail does not sanction sufficient provisions to a wife or husband, these may be secured either by means of a life insurance and a liferent infeftment in favour of trustees to the extent of the premium, or more effectually, by taking advantage of the provisions of the statute (*g*). An entailed proprietor is empowered to provide his wife by infeftment in a liferent annuity of one third part of the free yearly rent or value of the estate, as at the death of the granter, after deducting the yearly amount of all provisions, interest of debts and provisions, and other burdens of what nature soever, affecting the estate or its yearly rents or proceeds. A wife may, on the other hand, infeft her husband in an annuity not exceeding one-half of the free rent ascertained in the same manner; to be restricted to a third in the event of a pre-existing annuity to a husband secured over the estate. And when two liferent annuities to wives or husbands, granted under the statute, shall be subsisting at one and the same time, it is declared incompetent to grant a third liferent to take effect before one of the former liferents shall cease or expire; but the power of granting a liferent may be exercised so as to increase a former liferent, or grant a new liferent to take effect upon the ceasing or expiration of any former or subsisting liferent, although the same may not take place in the lifetime of the person granting such prospective or increased liferent. In adapting the powers given by this statute to practice, it is expedient to quote the precise words of the clause authorising annuities to wives and husbands, and likewise to declare that the particular provision is granted and accepted, subject to the provisions of the statute, and shall in no event exceed the amount thereby authorised (*h*).

(*a*) Jurid. Styles, 1. 185-6.

(*b*) Campbell, 6th Feb. 1821, F. C.

(*c*) See Forms, Jurid. Styles, 1. 200-1.

(*d*) Glencairn, 26th Jan. 1804, noticed in Agnew, below. Campbell, 21st May 1831, F. C., 9 S. 624.

(*e*) Agnew, 12th Dec. 1810, F. C. (p. 161 of vol.); Malcolm, 21st Nov. 1823, F. C., 2 S. 514. See above, § 275.

(*f*) Chisholm or Gooden, 2d Dec. 1829, F. C., 8 S. 165.

(*g*) 5 Geo. IV. c. 87.

(*h*) Jurid. Styles, 1. 188-90.

310. TENENDAS AND REDDENDO.—In the form to which reference has been made (*a*), these clauses are not proper feudal clauses of the nature which their titles import, but a part of the alternative obligation to infeft, and they ought to be introduced in the proper place. A marriage-contract is a disposition, and not a feu or blench charter.

(*a*) See Jurid. Styles, 1. 176-7.

311. PROCURATORY OF RESIGNATION.—This clause authorises resignation in favour of the heirs of the marriage and substitutes expressed in the destination, which is here repeated. When it is expected that the husband or wife may succeed to an estate during the subsistence of the marriage, a clause (*a*) may be introduced at the end of the procuratory of resignation, binding the parent to convey it to the heir of the marriage, the second son, or otherwise as may accord with the agreement of parties.

(*a*) Jurid. Styles, 1. 180.

312. PROVISIONS TO YOUNGER CHILDREN (*a*).—1. *Terms descriptive of the children.*—(1.) The words, *bairns*, *bairns and children*, or *child and children*, (above, § 295. 2.) include the whole issue, and consequently the heir of the marriage. When the heir is otherwise provided, the words, *excepting, or other than the heir of the marriage*, will therefore be employed. A money provision *to the heirs of the marriage*, or in equivalent terms, secured over feudal subjects, belongs to the heir in heritage; (above, § 295. 2.); and it is thought that the same rule will hold good in relation to a sum appointed to be so secured, but not actually invested. (2.) *Daughters, or heirs-female, failing heirs-male*, mean the immediate daughters of the marriage, and do not comprehend the daughters of a son who predeceases the father (*b*).

2. *Provision by burdening the heir.*—Provisions to the younger children of the marriage, or the children of a second marriage, secured over feudal subjects, or imposed on the heir of the marriage, may be granted in various modes. The most usual is by providing a sum of money, which it is unnecessary to declare an express burden on the estate destined

to the heir of the marriage, unless the father be divested of the fee. The obligation is equally onerous as the destination, and must be implemented by the heir if the moveable succession prove insufficient. The father has even the power of granting rational provisions to younger children by bond, although not of increasing suitable provisions already constituted so as to affect the heir of the marriage (*c*), and, *a fortiori*, to provide sums to children of a second marriage by contract, which may be made good out of lands settled on the heirs of the first marriage (*d*). But when lands are conveyed to the heirs of a marriage in fee, leaving only a liferent or fiduciary fee in the father, the provisions to younger children must, in the same deed, be declared a debt against the heir of the marriage, or the estate. This may be done, either by a real lien in favour of a trustee for the younger children, or by imposing a personal burden upon the heir.

3. *By an obligation to secure a sum of money.*—A provision may be declared in the form of an obligation to invest a sum on heritable security, and to take the rights to the spouses in liferent, and the children in fee; and the terms of a bond, taken in implement of the clause, will, *in dubio*, be interpreted according to the legal import of the clause itself (*e*). An obligation of this nature seems to be sufficiently implemented by investing the money in the purchase of lands, even although the rents should fall short of the ordinary interest of the sum provided (*f*).

4. *Provision by burdening the jointure of the wife.*—This form of provision must necessarily be limited to the lifetime of the widow. It may be constituted by an obligation on the wife to pay a certain yearly sum to the children, or by restricting her liferent annuity in the event of children existing of the marriage, and declaring that the excrescence shall belong to the children. A provision so constituted is not affectable by the husband's creditors (*g*).

5. *A direct conveyance to the prejudice of the heir incompetent.*—But a father cannot provide for his younger children, or the children of a second marriage, by a direct conveyance to them of a portion of the subjects destined to the heir of the first marriage. The distinction is, that although he may bur-

den the subjects by rational provisions which will be binding on the heir, he cannot deprive him of the *ipsum corpus* of the property, which would imply an alteration of the destination (*h*). This rule is of much importance in practice with reference to the contract of a second marriage.

6. *Constitution of jus crediti.*—(1.) By the modes described in Art. 2. and 3, of providing sums of money to children *nascituri*, they become, in the ordinary case, mere heirs of provision (*i*), and have a valid claim against the father's free succession only, in family questions occurring after his death (*k*). (2.) To vest in the children a *jus crediti* as against the father, and in competition with his creditors, and so as to transmit a right to their own heirs in the event of their predeceasing the father, they must be made proper creditors of the father, and not merely of his estate. This may be done by declaring the provision, whether conceived directly in their favour, or appointed to be invested for their behoof, to be payable at a term certain, or any other period which may arrive during the father's lifetime, or to bear interest from such term or period (*l*). Thus, under an obligation to pay a sum of money *to the heirs and bairns of the marriage, at their age of fifteen*, the children were held not to be heirs-substitute merely, but formal creditors for the sum in the contract (*m*). On the same principle, adjudication in security was allowed to pass upon a provision in favour of daughters, *payable at their respective marriages, if the same should happen in the father's lifetime; but, in case of his predecease, at their ages of eighteen years complete, or at the first term of Martinmas or Whitsunday after his death, either of them last falling out* (*n*). The same effect will be produced by providing a sum *to the bairns and children of the marriage at their respective ages of sixteen, with annualrent thereafter* (*o*); or at the father's death, if their shares are declared *to bear interest from the majority or marriage of each child, whichever of these events should first happen* (*p*); or by an obligation to invest a sum *for behoof of the wife in liferent, and a child nominatim in fee;* or by restricting the father's right to a fiduciary fee (*q*); or constituting a trust for the use and behoof of the children (*r*). (3.)

But the clearest indication of a purpose to constitute the provision a debt against the father will fail in effect, if such purpose be controlled by the tenor of other clauses, or the amount of the provision and the term of payment be made contingent on an event, such as the succession of an heir of the marriage, which cannot by possibility occur until after the death of the father (*s*). (4.) As the test of the children being creditors, or mere heirs of provision, is thus the term at which principal or interest becomes due, it is plainly of no moment that the father has given or procured heritable security for the amount, so long as the fee is in his person. Such security cannot alter the destination of the sum, or do more than preserve it for those who may have the preferable right (*t*); nor is the obligation on the father made broader by the prohibitory diligence of inhibition, which cannot propel the term of payment (*u*); but a right constituted in the person of a trustee will give a preference to the children according to the nature of the security, without regard to the term of payment, since by this means the father is divested of the fee, and it would seem that he himself may competently be made a trustee for this purpose (*v*). (5.) When the obligation is to invest a sum for behoof of the younger children, or give them infeftment in a particular subject *de præsenti*, or at a fixed period which may arrive during the lifetime of the father, their right of credit is not contingent on implement of the obligation, but is perfected by the obligation itself (*w*). (6.) In those cases where the children have a proper right of credit, it warrants diligence by inhibition or adjudication in security against the father (*x*); and when the obligation is to invest a sum on good security, or to give infeftment in a particular subject, implement may be enforced by action or diligence, although not so as to force the father to dispose of effects which form the source of his livelihood (*y*). In competition with creditors of the father, the right of credit founds a claim for an absolute or a *pari passu* preference, according to the nature of the security (*z*).

7. *Substitution to the heirs of the children.*—(1.) When a proper *jus crediti* is constituted, it appears superfluous to substitute the heirs of the children; but if it is intended

that the provision shall belong to the heirs-general of pre deceasing children—an unusual destination—it must be so expressed. The claim of the children and their issue is favourable, but not that of their heirs whomsoever (*aa*). (2.) An implied substitution to the heirs of their bodies takes place even where the children have not, by the terms of the contract, a proper *jus crediti*. Thus, under an obligation by the husband to invest a sum in heritable security, and to take the rights *to himself and his wife, and longest liver, in liferent, and to the child or children to be procreated betwixt them, in fee*, terms which leave the fee with the father, the issue of a daughter predeceasing the father was held entitled to her share (*bb*). It is usual, however, specially to substitute the issue of predeceasing children.

8. *Father's power of division.*—A power to distribute among the children a money provision, secured, or appointed to be secured over feudal subjects, is usually reserved in express terms, although it seems a part of the *patria potestas*, but not to the entire exclusion of any one child (*cc*). Where no apportionment has been made by the father, the division will be in equal shares; and if the division is so provided, the power of apportionment is necessarily excluded.

9. *Power in the children to transact.*—A child of the marriage having a mere *spes successionis*, may transact with the father, and discharge his share of the provision. This rule may be of much practical importance; (above, § 299. 2.)

(*a*) Ewing, 1st July 1747, M. 2308.

(*b*) Jurid. Styles, 1. 177.

(*c*) M'Culloch, 24th June 1763, B. S. 5. 895. See Dykes, 9th Feb. 1811, F. C.; Miller, 30th July 1822, S. (Ap.) 1. 308.

(*d*) Erak. 3. 8. 42.

(*e*) I the said A. bind and oblige myself my heirs executors and successors to employ and invest the sum of £ upon land or other sufficient heritable security and to take the rights and securities thereof to myself and the said B. my intended spouse and longest liver of us two in liferent for our liferent use allenarly and to the child or children (other than the heir of the marriage) to be procreated of the said intended marriage in fee; whom failing to me the said A. and my own nearest heirs and assignees whomsoever. See Macdonald, 14th Jan. 1831, F. C. and 9 S. 269.

(*f*) Forbes, 24th Nov. 1760, M. 2278.

(*g*) Creditors of Kinminity, 20th Jan. 1756, M. 6127, B. S. 5. 842; Blairs,

5th Aug. 1782, M. 2280. The clause was in these terms: "But declaring "that in case there shall be children one or more male or female procreate of "the said marriage and existing at the death of the said A. and that the said "B. survive him then and in that case she hereby during the existence of the "said child or children restricts and limits her liferent to an annuity of L. "sterling yearly upliftable furth of the said lands; the remainder of the "rents and profits thereof being to go to the child or children to be procreate "of the said marriage."

(*h*) Bruce, 7th Feb. 1761, M. 13,036; Lord President Blair, in Dykes, as in (*c*).

(*i*) Ersk. 3. 8. 39; Beg, 14th Jan. 1663, M. 4251; Graham, 24th Jan. 1677, M. 12,887. See Frog, 25th Nov. 1735, M. 4262. The clause referred to in note (*b*), above, gives no *jus crediti*.

(*k*) Ersk. as in (*i*); Murray, March 1686, M. 12,895; Napier, 24th July 1696, M. 12,898; Cundell's Trustees, 7th July 1837, F. C., D.

(*l*) Ersk. 3. 8. 40; Bell's Princ. 1986, and cases cited; Lord Justice-Clerk Boyle in Brown, 1st Feb. 1820, F. C.

(*m*) Preston, 15th July 1691, noticed in Lyon, below.

(*n*) Lyon, 24th Jan. 1724, M. 8150.

(*o*) Wilsons, 13th Jan. 1825, F. C., S.; Hamilton, Feb. 1690, noticed in Lyon, above.

(*p*) Mackenzie, 2d Feb. 1792, M. 12,924.

(*q*) Blackburn, 29th May 1816, F. C. See above, note (*e*).

(*r*) See Gibson, 4th Feb. 1726, M. 12,885; Farquhar, 10th March 1838, 16 D. 948.

(*s*) Mactavish, 15th Nov. 1787, M. 12,922. See Ballingall, 31st Jan. 1759, M. 12,919; Brown, as in (*l*).

(*t*) Brown, as in (*l*); Poole, 22d Feb. 1834, 12 S. 481.

(*u*) Ersk, 3. 8. 39; Graham, 24th Jan. 1677, M. 12,887; Gordon, 3d June 1748, M. 4398 and 12,915; affirmed on ap. 7th March 1751.

(*v*) Gibson and Farquhar, as in (*r*).

(*w*) Falconer, 20th Jan. 1825, F. C., 3 S. 455.

(*x*) Douglas, 22d July 1724, M. 12,910. See Lyon, as in (*n*); Brown, as in (*l*).

(*y*) Henderson, 22d Feb. 1750; M. 6563-4; Cumming, noticed in Douglas, as above.

(*z*) Marjoribanks, Feb. 1682, M. 12,891. See Douglas, as in (*x*); Falconer, as in (*w*); Young, 2d Dec. 1835, F. C., 14 D. 85; Farquhar, as in (*r*).

(*aa*) Grindlay, 1st July 1814, F. C.

(*bb*) Wood, 26th June 1789, M. 13,043.

(*cc*) Edmonstone, 19th July 1706, M. 3193; Campbells, 16th Dec. 1738, M. 13,004; Elch. *Mut. Contr.* 14.

313. PROVISIONS TO CHILDREN OUT OF ENTAILED ESTATE. —1. *Under a power in the entail.*—When authorised by the deed of entail, the provisions will be granted in accordance with the power, in the same manner as a provision by annuity

to a widow (*a*). This may be done in a marriage-contract, or by bond of provision; (see above, § 275. 2.)

2. *Under Lord Aberdeen's Act.*—(1.) The provisions authorised by the statute (*b*) are not in words to the younger children of an entailed proprietor, but *to the lawful child or lawful children who shall not succeed to the estate*, and are valid to such child or children only as are alive at the death of the granter, or of whom the wife of the granter is then pregnant. But power is given by an express clause in the "contract, "made in consideration of the marriage" of any child, to settle his or her provision, or any part of it, with consent of the granter of the provision, on the issue of the marriage, so as to be effectual to them in the event of the husband or wife, as the case may be, predeceasing the granter. It is of importance that this power of substitution should be in the view of the conveyancer. (2.) The question may arise (*c*), is the eldest son a child in the sense of the statute, on whom a provision may be settled so as to be transmissible by contract of marriage to his own children, in the event of his predeceasing the granter of the provision? The purpose of the enactment plainly being to benefit wives and younger children, it may perhaps be doubted if the words, *who shall not succeed to the estate*, embrace the presumptive heir of tailzie, whose succession can only be disappointed by his predecease. To him, by the assumption, the provision can never be available, and it must therefore necessarily be made by the granter not for the benefit of his eldest son, but of his grandchildren by that son, an exercise of the faculty which can hardly be supposed to have been contemplated by the Legislature. Nor is the difficulty removed by the provision to the grandchildren being indirectly made by the granter; for if the eldest son can in no conceivable event take benefit by that provision, it is thought he must be wanting in power to convey the right to his children.

3. *Statutory provision how constituted.*—(1.) The provisions authorised by the statute are, for one child, one year's free rent or value, after deduction of burdens; for two children, two years' free rent or value, and for three or more children, three years' free rent or value on the whole. The rent is

that of the year current at the time of the granter's death (*d*). Where provisions subsist in favour of the children of former proprietors, it is declared that no farther provisions shall be granted until some part of the three years' rent shall be set free; but upon the extinction of the whole or any part of such subsisting provisions, the heir in possession is empowered to grant provisions to his children, or increase those already constituted. It follows that an entailed proprietor can in no event anticipate the period when the three years' rent, or part of it, shall be free; the subject out of which to grant provisions must actually exist. (2.) It has been questioned if the power conferred by the statute can be exercised by means of a personal bond or obligation in a marriage-contract, or only by means of heritable burdens on the estate. The form of the wife's provision is declared to be a liferent annuity by infeftment; but the words of the act in respect to children, are "bonds of provision or obligations, binding the succeeding "heirs of entail." Where bonds are granted under a power in a deed of entail, *to burden and affect the lands and estate* with sums of money for the suitable provision of younger children, it has been held that the power is effectually exercised by means of bonds narrating the power, and binding personally the granter and the heirs of tailzie, in conjunction with all his other heirs (*e*). *A fortiori* ought a personal obligation by bond, or in a marriage-contract, to be effectual under the terms of the statute. The granter usually imposes a subsidiary obligation on his own heirs and successors whomsoever.

(*a*) Jurid. Styles, 1. 188, and foll.

(*b*) 5 Geo. IV. c. 87.

(*c*) Jurid. Styles, 1. 193-4.

(*d*) Campbell, 21st May 1831, F. C., 9 S. 624.

(*e*) Cleghorn, 18th Jan. 1833, F. C., 11 S. 259; but remitted for reconsideration, 8th Sept. 1835.

314. DISCHARGE BY THE HUSBAND OR WIFE (*a*).—This clause is employed to exclude the legal rights of the parties, and has been sustained as effectual (*b*). (1.) It is usual to renounce the terce in express terms, and this seems to be

proper, even where a provision constituted by infeftment has been accepted by the wife; (above, § 302. 5.) (2.) Where it is intended that the courtesy shall be excluded, an express renunciation will be introduced. The discharge by the children relates to their claims on the father's moveable estate.

(*a*) And which provisions above written conceived in favour of the said B. she hereby accepts of in full satisfaction of all terce of lands half or third of moveables and every other claim or provision whatever which she could by law ask or demand by and through the decease of the said A. in case she shall survive him and in full of all that her heirs executors or nearest of kin could ask or claim on any account whatever by and through her decease in case she shall predecease her husband. *Note.*—When it is intended that the husband shall not retain his right of courtesy, it must be expressly renounced by means of a similar clause.

(*b*) Crawford, 24th Dec. 1746, M. 2274 and 11,450.

315. ASSIGNATION BY THE WIFE (*a*).—In consideration of the provisions contained in the contract, the wife ordinarily conveys her whole property to the husband. It may be proper under this head to notice generally those means whereby the income of the wife's heritage may be placed beyond the control of the husband. (1.) It has long been a settled point, that the *jus mariti* and right of administration in the husband may be renounced by him or excluded by third parties conveying property to the wife (*b*), and the wife may effect the same end before marriage by means of a trust (*c*). With respect to the interest of funds belonging to the wife, she may in a contract of marriage effectually declare them to be alimentary, and *not attachable, or arrestable, or affectable in any manner for the husband's debts and deeds* (*d*). (2.) The *jus mariti*, and right of administration or curatorial power in the husband, are distinct, and ought therefore to be specified; and they may be provisionally excluded by a third party conveying property to the wife, on the occurrence of a certain event, such as the bankruptcy of the husband (*e*).

(*a*) See Jurid. Styles, 1. 178.

(*b*) Ersk. 1. 6. 14; Annand, 4th March 1774, M. 5844, affirmed; M'Donald, 29th Jan. 1793, M. 5848; Keggie, 25th May 1815, F. C.; See Forms, Jurid. Styles, 1. 206.

(*c*) Murray's Trustees, 5th Feb. 1745, M. 5843.

(*d*) M'Donell, 25th Nov. 1819, F. C.

(*e*) Annand, as in (*b*.) (*Clause in a settlement by the wife's father.*)—And in the event of the insolvency of the said B. the said C. secludes and debars the said B.'s *jus mariti* and him from the administration and management of the said estate heritable and moveable above conveyed and of the rents maills and duties and other produce and profits of the same and declares that the same shall not be liable or subjected to the payment of his debts implement of his deeds or affectable by the diligence of his creditors.—Keggie, as in (*b*). (*Clause in a deed of separation held effectual to exclude the right of administration.*)—The said A. does hereby renounce in favour of the said B. his *jus mariti* and all other right or title he has or can claim to the rents of the subjects in C. liferented by her and declares that her own receipt therefor shall be sufficient exoneration to the tenants of said subjects or others concerned.

316. PROVISION AGAINST DISSOLUTION OF THE MARRIAGE (*a*).—This clause is employed to control the rule of law whereby the legal and conventional provisions (even such as have been made by friends of the spouses in contemplation of the marriage) lapse by the dissolution of the marriage within year and day from its constitution, without a child having been born who was heard to cry (*b*). The proviso in the clause has been sustained as effectual (*c*); and unless it is introduced in the contract, the widow, on the premature dissolution of the marriage, has a claim merely for aliment against the husband's heir, and that of a doubtful description (*d*).

(*a*) And farther it is hereby CONTRACTED AND AGREED on by both parties that although this present marriage should happen to dissolve by the death of either party within the space of year and day after the solemnisation thereof and without a living child born of the same yet this present contract and whole provisions herein contained in favour of the husband and wife respectively shall subsist and continue in full force in favour of the survivor in the same manner as if the marriage had subsisted for more than year and day or a living child had been born of the same any law or custom to the contrary notwithstanding.

(*b*) Stair, 1. 4. 19; Ersk. 1. 6. 38-40; Bell's Princ. 1943, and auth. cit. See Roberton, 22d Jan. 1833, S.

(*c*) Garden, 19th Feb. 1743, M. 2271. The clause was substantially the same as in the above example.

(*d*) See Lowther, 15th Dec. 1786, M. 435.

317. APPOINTMENT OF TRUSTEES (*a*).—It is usual in marriage-contracts to name certain persons as trustees, at whose instance, or that of their heirs, execution may pass for implement of the provisions in favour of the wife and children.

(*a*) AND lastly it is hereby PROVIDED AND DECLARED that execution shall pass hereon at the instance of *(friends of the wife)* or at the instance of any one or more of them or of any of their eldest sons or apparent heirs for implement of the provisions above written conceived in favour of the said B. and the issue of the said intended marriage.

318. CLAUSE OF REGISTRATION.—The registration authorised by this clause is general, in the books of Council and Session or others competent for preservation and execution.

319. PRECEPT OF SASINE.—This clause is in the ordinary form, and refers to the destination, provisions and burdens expressed in the dispositive clause.

320. INFEFTMENT (*a*).—The feudal effect of infeftment upon the contract of marriage depends upon the terms of the dispositive clause, and more particularly of the destination. (1.) As infeftment cannot be given separately to disponees whose names are not expressed in the warrant, it follows that a destination to *heirs*, or *heirs of the marriage*, is incapable of being made a real right. This illustrates the principle which regulates destinations to spouses in conjunct fee and liferent, and to the heirs of the marriage in fee; for if such heirs cannot be validly infeft, it is plain that they have no feudal right in the subjects contained in the conveyance, and the fee must therefore of necessity remain with the granter, or be held in trust by one or other of the parents. It is essential, however, that infeftment be given in the precise terms of the destination, in order to perfect a right either of absolute or fiduciary fee in the person of the parent. Thus, under a conveyance *to A. and B., spouses, in conjunct fee and liferent, for their liferent use allenarly, and the heirs of the marriage in fee*, the exclusion from the sasine of the heirs of the marriage feudalises the conveyance to the extent only of a bare liferent in the parents. The same result would happen under a destination to *A. in liferent, and to the heirs of his body in fee* (*b*). For although it is held that a fiduciary fee in the one case, and in the other an absolute fee, is created in the person of the father, who, by the form of the clause, has a liferent only, it is to the whole clause and not to a part of it that the

law, from the necessity of the case, has given that construction. But although the restriction of the infeftment to a liferent thus limits the feudal right, and, of consequence, leaves the disponer undivested of the fee, it by no means restricts the right under the contract. That right necessarily remains entire, but continues personal (*c*). (2.) Infeftment, on the other hand, to children named in a postnuptial contract, completes the right. (3.) Infeftment is essential to secure the rights of the parties favoured, in competition with the creditors of the spouse to whom the subjects belong, or of a relation of either of the spouses who comes under a mere obligation to convey lands to them, or the heirs or children of the marriage. Thus, where a destination bears by *A. to himself in liferent allenarly, and the heirs of his body in fee*, and infeftment is taken in favour of the father in the liferent only, he is consequently undivested of the fee; and on his insolvency, the heir of the marriage has a mere personal claim under the contract (*d*).

(*a*) Jurid. Styles, 1. 271.

(*b*) Ersk. 2. 3. 48; Grahame, 4th July 1759, M. 6931; Dundas, 23d Jan. 1823, 2 S. 145; Falconer, 20th Jan. 1825, F. C., 3 S. 455.

(*c*) See Grahame, as in (*b*).

(*d*) Falconer, as in (*b*).

321. CONTRACT CONTAINING A TRUST.—The constitution of a trust for securing the provisions of the wife and children is the most effectual form of settlement (*a*). By this means the control of the husband is effectually excluded, and the rights conveyed are completed without the interference of any of the parties interested; and being vested in trustees, are removed from the influence of the husband and of the heir of the marriage. The only objection is to the intricacy and expense of this mode of management.

(*a*) Jurid. Styles, 1. 209, and foll.

TITLE V. TRUST-DISPOSITION AND SETTLEMENT.

322. INTRODUCTORY REMARKS.—The general principles of our law on the subject of trusts or *fidei-commissa* are de-

rived from the Civil law. "Trust, in the vulgar accepta-
"tion, (says Lord Stair,) (*a*) comprehends all personal obli-
"gations for paying, delivering or performing any thing where
"the creditor hath no real right in security;" "but trust,
"properly so called, is the stating a right so far in the per-
"son of the trustee, as it can hardly be recovered from him
"but by his faithfulness in following that which he knows to
"be the true design of the truster." In another place he says (*b*), trust property is that which the law calls *fidei-com-*
"*missum*, where there is no reversion, bond, or promise of re-
"version; yet the truster knows *quid actum est*, that it was
"not a donation or gratuitous alienation; but that the granter
"did trust that the trustee would dispose of it as the truster
"would require." Originally, therefore, the faith of the truster was implicit, the trustee being under no other than a moral obligation to perform the duty intrusted to him. In that state of the law, it was competent to prove the trust against the trustee "indirectly, by circumstances inferring the same," as "it were to small purpose to refer it to his oath; for it is "presumed that he who would steal would swear" (*c*). But upon the recital, that "the intrusting of persons without any "declaration or back-bond of trust in writing from the per-
"son intrusted are occasions of fraud, as well as of many pleas
"and contentions," it was at length enacted (*d*), "that no
"action of declarator of trust shall be sustained as to any
"deed of trust made for hereafter, except upon a declara-
"tion or back-bond of trust, or unless the same be referred
"to the oath of the party *simpliciter*." This was the first step in the progress of the trust-right towards its present shape; and we find that the absolute disposition, qualified by back-bond, came, in consequence of this enactment, to be the common mode of constituting a trust. The next step was the modern trust-deed.

(*a*) Stair, 4. 6. 2.
(*b*) Stair, 4. 45. 21.
(*c*) Last refer.
(*d*) 1696, c. 25.

323. TRUST AS A FEUDAL RIGHT.—The trust-disposition is

a writ of extensive application in practice. The subject of trust-rights has become of much importance and of considerable intricacy, and is one which may claim separate and more extended consideration. It is in a feudal respect only that it falls within the scope of this work. The advantages of vesting heritable property in trustees in a variety of situations are great. The right, when feudally completed in the persons of the trustees, is absolute in one respect, that the subject and the radical title are effectually burdened with the trust-right, whilst at the same time the trustees are controlled by the conditions of the trust. Thus, it is common in practice for entailers, where the estate is incumbered, to execute a trust-deed in relation to, and as a qualification of the conveyance made by the deed of entail, which is thus burdened with the trust. And it is held that two sets of titles, one in the trustees in fee-simple, the other in the person of the institute or an heir of tailzie, under the fetters of the entail, are not feudally inconsistent,—the former being essentially a burden on the right of the members of tailzie, which is suspended by its operation, but obtains full effect as soon as the purposes of the trust are fulfilled (*a*). Trust is likewise of advantage in this respect, that a number of distinct interests may thereby be created in a right which, in a feudal sense, is single. The estate, for example, may be held for behoof of existing parties in liferent, and of children unborn in fee; or its price or value may be divisible among divers persons whose shares are payable at separate periods; or it may be vested in trustees for the benefit of creditors. Parties in these situations have no direct title to the immediate subject of the trust, but a *jus crediti* only, or right of action against the trustees: by these means the most complicated interests are put in train of adjustment without the delay and expense of separate judicial procedure, and the truster's representatives saved from the risk of incurring a universal liability for his debts by service or otherwise. It is not my intention to consider the several forms of trust-deeds; the trust-disposition and settlement will serve as a type of the class. It usually consists of the following clauses: *The narrative; the dispositive; obligation to execute necessary deeds; nomination of executors; purposes of the trust; power of sale;*

obligation to infeft; procuratory of resignation; assignation to writs and rents; nomination of tutors and curators; powers of management; reserved power to revoke; clause of registration; precept of sasine, and testing clause. Those clauses only will be noticed which call for particular observation, as most intimately connected with the feudal right. Reference is made to the Style-book (*b*).

(*a*) See Melville, 8th Feb. 1838, 16 D. 457.
(*b*) Jurid. Styles, 1. 257.

324. DISPOSITIVE CLAUSE (*a*).—This part of the deed contains the nomination of the trustees, and a description of the subjects conveyed. This description is usually special, of a particular estate, and general, of all the truster's heritable and moveable property. With respect to the trustees, the following particulars deserve the attention of the conveyancer:

1. *Who capable of being trustees?*—(1.) It may be observed, generally, that any person of twenty-one years of age, not under legal incapacity by having been declared infamous or by outlawry, and who enjoys the confidence of the truster, may hold the office of trustee. Mere absence abroad does not create even a temporary incapacity, unless it is so declared (*b*). (2.) It has been doubted if the nomination of a female do not fall by her marriage. If appointed in a *mortis causa* deed, whose effect is necessarily suspended till the granter's decease, her intermediate marriage does not vacate the appointment; but an opinion has been expressed that the consent of the husband is essential to the validity of the wife's acceptance of the trust (*c*). In more recent cases, it seems to have been assumed that an appointment which has taken effect does not fall by marriage, but that the concurrence of the husband is required to validate the acts of the wife (*d*). (3.) Bankruptcy has, in one instance, been held to vacate the office of trusteeship (*e*); but the decision is not regarded as amounting to a declaration of absolute incapacity (*f*); and it may be advisable, therefore, to introduce a qualifying provision, that bankruptcy shall void the appointment. (4.) Nor does insanity, which may be only temporary, seem necessarily to vacate the office (*g*).

2. *Number.—Terms of appointment.*—(1.) There is no

limit to the number of the trustees except in the will of the truster. A sole trustee is perhaps most efficient in trusts for a single and immediate object; *e.g.* the sale of lands and division of the price among creditors; the purchase of lands to be subjected to the fetters of an entail; or the discharge of an entailer's debts. But where the management must be of long continuance, or large discretionary powers are conferred, as in family settlements, it is advisable to appoint a plurality of trustees. (2.) If the nomination is not sole, the terms of the appointment must be carefully expressed. A nomination joint in express words, necessarily imports a trust in the whole; and even where it is not so expressed, the presumption seems to be that the nomination is joint (*h*). The result is, that if one of any number of joint trustees should die or be denuded, or become incapable, the trust is at an end; and the like happens when a certain specified number, appointed a quorum, which is a joint body, does not accept or is not maintained (*i*); or if any one trustee who has been appointed a *sine quo non*,—an essential component part of the quorum,—shall vacate his trusteeship. It follows that the number invested with the powers of the trust, whether the trustees as a body, or their quorum, must concur in every act of administration (*k*). From these rules has arisen the practice of investing the accepting and surviving trustees, or the major part of them, with the powers of the trust, which thus subsists so long as any one or more of those who have charged themselves with the trust are alive, and not denuded of the office (*l*). (3.) When the trust is evacuated by death or otherwise, or suspended by refusal to accept, or by absence in cases where residence within the kingdom is required, the rule seems to be, that if mere acts of administration are to be performed in order to the protection of the trust-property for the party having a beneficial interest, the Court will appoint a judicial factor to manage it (*m*); but that they will exercise their *nobile officium* in the nomination of trustees or managers in those trusts only which are created by statute or constituted for charitable purposes, and where no party has any direct or immediate interest in the management; at least, that, in the ordinary case, the concurrence of all parties interested is a desi-

rable, although not a necessary preliminary to the appointment of trustees by the Court (*n*). (4.) Trusts, with extensive discretionary powers of disposal or distribution, imply a *dilectus personæ*, and fall by refusal to accept (*o*); provision ought therefore, in such cases, to be made, to prevent the conveyance from being inoperative. It might, in all cases, be advisable to sanction the appointment of trustees by judicial authority, in the event of the death or incapacity of those named in the deed, without having devolved the trust upon others.

3. *Acceptance.*—(1.) It is usual for trustees to declare their acceptance in express terms, by a minute subjoined to the deed; but acceptance will be inferred from facts and circumstances, *e. g.* by a person duly nominated a trustee permitting his name to be used judicially, or in correspondence on the subject of the trust (*p*). (2.) A party who has accepted of the trust cannot capriciously refuse to concur in necessary acts of administration, if his concurrence is essential. A trustee is held to accept, under an implied condition that he shall carry through the trust; and he will not be permitted to resign without due cause when a quorum would not remain, but may be compelled to adhibit his subscription to necessary documents (*q*). Accordingly, where a trustee, by refusing to join in executing a discharge, occasioned a loss of interest to the trust-estate, the Court held him personally liable in the amount of the loss, and in the expenses occasioned by his contumacy (*r*). (3.) Even where the name of a party is introduced in feudal titles as a trustee, without his consent, he will not be permitted to embarrass the management by a refusal to perform the necessary act of denuding of the right. He must execute the deeds proper for that purpose, on being relieved of expenses and all responsibility (*s*). Another remedy is by declarator and reduction of the title.

4. *Power to delegate.*—(1.) By the form in the notes (*t*), power is given to the accepting and surviving trustees or trustee to appoint new trustees, the choice of whom is sometimes given to a party interested in the trust (*u*). The power may be conferred either without limitation as to numbers, or to the extent only of filling up vacancies by death, resignation or incapacity (*v*). (2.) A faculty of this description cannot be

exercised even by the whole body of the trustees, without express authority in the deed; and when the power is given, it can only belong to the whole trustees, or their legal quorum, if a quorum be authorised (*w*). (3.) This power is highly convenient in practice, and may be exercised even on deathbed (*x*); but the new trustees are not vested with the feudal right, by infeftment in general terms, as in the dispositive clause, joined to a simple nomination as such. The subject of the trust must be conveyed to them *nominatim*.

5. *Remuneration.*—Trustees appear to have no legal claim for remuneration, even trustees for creditors (*y*). In family settlements it will be expressed, when it is not expected that the trustees will act gratuitously.

(*a*) GIVE GRANT and DISPONE to and in favour of B. C. and D. and to the survivors and survivor of them who shall accept and the heirs of the survivor the major part of those accepting and surviving and resident in Scotland (or Great Britain) for the time being always a quorum for executing the purposes of this trust ALL and WHOLE *(the subjects)* AS ALSO all other lands &c. BUT IN TRUST always for the ends uses and purposes herein-after mentioned.

(*b*) Heriot's Trs. 8th March 1836, F. C., 14 D. 670.

(*c*) Stoddart, 30th June 1812, F. C.

(*d*) See Watson or Darling, 14th Jan. 1824, 2 S. 607; affirmed, 11th May 1825, 1 W. S. 188; Alison or Laird, 16th Nov. 1833, F. C., 12 S. 54.

(*e*) Macdowall, 20th Nov. 1789, M. 7453. See Smith, 15th May 1832, 10 S. 531.

(*f*) See Bell's Com. 1. 32, note; Morland or Cowan, 20th Jan. 1837, F. C., 15 D. 398.

(*g*) Fraser, 1st March 1837, F. C., 15 D. 692.

(*h*) Bell's Princ. 1993.

(*i*) Freen, 28th June 1832, F. C., 10 S. 727; Ferrie, 31st May 1834, 12 S. 672.

(*k*) See Heriot's Trs. as in (*b*).

(*l*) Campbell, 26th June 1752, M 7440.

(*m*) Bushy, 1st Feb. 1823, 2 S. 176; Alexander, 27th Feb. 1824, 2 S. 745; Boyd or Sherriffs, 24th Jan. 1829, F. C., 7 S. 314; Smith, 15th May 1832, 10 S. 531; Ireland, 18th May 1833, 11 S. 626; Nisbet, 31st Jan. 1835, F. C., 13 S. 384; Morland or Cowan, as in (*f*). See Fraser, as in (*g*); Lacy, 7th July 1836, 14 D. 1112.

(*n*) See Macdowall, as in (*e*); Melville, 8th Feb. 1838, 16 D. 457.

(*o*) Campbell, as in (*l*); Dick, 22d Jan. 1758, M. 7446.

(*p*) Davidson, 9th July 1835, F. C., 13 S. 1082.

(*q*) Lynedoch, 15th Feb. 1827, F. C., 5 S. 358; affirmed, 4 W. S. 148.

(*r*) Lynedoch, 20 Nov. 1832, F. C., 11 S. 60.

(*s*) Dallas, 21st Nov. 1710, M. 16,191.

(*t*) WITH POWER to the survivors and survivor of my said trustees (whether on

account of the death resignation legal incapacity or continued absence from Scotland of the other trustees) to nominate and appoint one or more persons from time to time to fill the vacancies in the number of my said trustees and to act along with them or him in the execution of the present trust with the same powers and as fully and freely in all respects as if the said persons were herein expressly named as trustees, and if necessary to execute all deeds proper for vesting in the person or persons so to be assumed the feudal right of the subjects above disponed.

(*u*) See Baillie, 11th March 1835, 13 S. 681.

(*v*) See Jackson or Ferrie, as in (*i*).

(*w*) Freen, as in (*i*). See Hunter, 7th Feb. 1834, F. C., 12 S. 406; Davidson, 9th July 1835, 13 S. 1082.

(*x*) Roughhead, 5th March 1832, 11 S. 516.

(*y*) Johnston's Trs. 4th Jan. 1738, M. 13,407.

325. PURPOSES OF THE TRUST.—1. *Form and interpretation.*—(1.) The directions given by the truster for the application or disposal of the trust-estate are usually expressed in the deed, but this is not essential to their efficacy. An heritable estate may be vested in trustees by a conveyance in trust and infeftment on it, subject to purposes and directions contained in another deed already in existence, or provisionally created by reference to a deed to be afterwards executed; and such deed may be in the form of a will, and executed according to the law of the place in which the truster is domiciled (*a*). (2.) The purposes of the trust in a family settlement are usually for the sale and division of the trust-property among the relations of the truster, for the conveyance of an estate to a particular series of heirs, or the investment of funds on security, and they ought to be fulfilled without unnecessary delay. Where trustees appointed to invest funds in heritable security or the purchase of stock declined, on the requisition of those interested, to carry the purposes of the trust into effect, they were held liable for the loss sustained by the parties in consequence of the delay (*b*). (3.) The purposes of the trust are interpreted according to the fair meaning of the terms (*c*).

2. *Reversionary interest.*—(1.) The ultimate purpose of a trust-deed may be to convey what remains of the subjects, after accomplishing the other objects of the truster, to a particular individual. If not specially provided to another, this reversionary right or interest is in the heir-at-law (*d*). (2.) The right of reversion of lands not sold by the trustees continues on the former investiture, unless the reversion be conveyed to

another; the radical right remains in the truster, who is not denuded by the infeftment of the trustees. Trust is thus a mere burden upon the radical right, and it is extinguished as soon as its purposes are fulfilled, in like manner as is a heritable debt by intromission. It has accordingly been held that the truster may validly entail the subjects of the trust, and that infeftment on the entail vests in the disponee such part of them as may remain after the trust is executed, without resignation *ad remanentiam* by the trustees (*e*). It follows that adjudication of the reversionary interest is effectual (*f*). (3.) The advances and obligations of the trustees form a preferable burden on the trust-subjects, and they cannot be compelled to denude until relieved of them (*g*). Trustees have even been allowed a preference over the price of lands conveyed to them by a trust-deed under which they had acted *bona fide*, but which was reduced at the heir's instance as an invalid conveyance, and that in competition with creditors of the heir holding real rights over the property (*h*).

(*a*) Willoch, 14th Dec. 1769, M. 5539; affirmed, 30th March 1772; Fordyce, 5th July 1827, 5 S. 897; Brack, 23d Nov. 1827, 6 S. 113; affirmed, 5 W. S. 61; Cameron, 19th May 1831, F. C., 9 S. 601.

(*b*) Morison, 9th Feb. 1827, F. C., 5 S. 322.

(*c*) Sprott, 22d May 1828, F. C., 6 S. 833.

(*d*) Cathcart, 26th May 1830, F. C., 8 S. 803.

(*e*) Macmillan, 4th March 1831, F. C., 9 S. 551; affirmed, 14th August 1834.

(*f*) Campbell, 14th Jan. 1801, M. App. *Adjud.* No. 11.

(*g*) Innes, 18th Dec. 1828, 7 S. 206.

(*h*) Campbell, 21st Nov. 1837, Scot. Jurist, 10. 190.

326. POWERS OF THE TRUSTEES.—These, in a feudal sense, relate merely to the conveyance of the estate to the purchaser, or under the directions of the truster (*a*). (1.) A power to sell, when intended to be given, ought in all cases to be expressed. Although not expressed, it may be inferred from the various clauses and general purposes of the trust-deed, but the question is one of difficulty (*b*). (2.) A power of sale falls short in its effect of a direction to sell. The former is a mere commission; the latter changes the nature of the right from heritable to moveable (*c*); so that the *jus crediti* of a party entitled to a share of the price descends to his executors.

(3.) In selling property, trustees are entitled to exercise a sound discretion in disposing of it to the best advantage, and they may delegate their powers to a factor or commissioner (*d*). As exposers, they are debarred from purchasing the trust-subjects; (above, § 109.) (4.) A direction to convey is construed according to the plain meaning of the terms. Thus, a direction to entail lands on a series of heirs, (being the children of the entailer all expressly named,) and *the heirs of their bodies in their order*, was held to be exclusive of heirs-portioners, the nature of whose right is inconsistent with the permanent existence of a strict entail (*e*). (5.) In conveying to a disponee, trustees may validly assign the precept of sasine in the trust-deed so as to warrant infeftment on it in his favour, provided it is conceived in favour of assignees free of the burdens and conditions of the trust; (see § 74. 3.)

(*a*) AND I do hereby give the most full and unlimited power to my said trustees above named and to be assumed and to the survivors or survivor of them and the heirs of such survivor to sell all or any part of my lands and estate particularly and generally above disponed and that either by public roup or private bargain as to them or him shall seem proper and to grant all necessary dispositions to the purchasers containing clause of absolute warrandice upon me and my heirs-general.

(*b*) See Erskine's Trustees, 13th May 1829, 7 S. 594; Robertson, &c., Glasgow's Trustees, 7th March 1832, F. C., 10 S. 438.

(*c*) Angus, 6th Dec. 1825, F. C. Cathcart, 26th May 1830, F. C., 8 S. 803. See Finnie, 30th Nov. 1836, 15 D. 165.

(*d*) Bell's Princ. 1998. See Thomas, 4th July 1829, 7 S. 828.

(*e*) See Sprott, 22d May 1828, F. C., 6 S. 833. See Noble, 18th May 1836, F. C. The clause in the case of Sprott was in these terms: "AND I do "direct that the said trustees shall as soon as conveniently may be lay out and "invest the sum of money so to be raised and lodged as aforesaid together with "all such other sums of or to which I shall be possessed or entitled at the time "of my death as aforesaid in equal moieties in the purchase of two or more "landed estates to be settled according to the law and practice of Scotland "as herein-after mentioned: That is to say the estates which shall be first pur-"chased with one moiety of the said sums shall be settled in strict entail on my "said son M. S. and the heirs of his body lawfully begotten whom failing to "my said son J. S. and *(the other substitutes, being the entailer's daughters, and "the heirs of their respective bodies in their order)* whom failing to my own "nearest and lawful heirs whomsoever; and the estates which shall be purcha-"sed with the other moiety of the said sum shall in like manner be settled in "strict entail upon my second son J. S. and the heirs of his body lawfully be-"gotten whom failing upon my said eldest son M. S. and the heirs of his body "lawfully begotten whom failing *(upon the same substitutes as in the deed first "mentioned.)*"

327. LIMITATION OF RESPONSIBILITY (*a*).—(1.) A consequence of the power of sale usually contained in the family settlement, is the intromission by the trustees, or certain of their number, with the price of the subjects, and persons nominated in a deed of that nature, which, as being a *mortis causa* conveyance, cannot be altered after it has come into operation, ought to be extremely guarded in accepting of the trust, unless they are protected by a clause limiting their responsibility to their actual intromissions. It is true, that in trusts which are gratuitous, a character not taken away by the trustee accepting of a small gratuity or legacy expressed in the deed, the leaning of the Court is in favour of trustees having no clause of limitation, unless in cases where acts of positive commission are established against them; but the omission of the clause may expose parties to vexatious questions (*b*). (2.) It is not, however, to be supposed, that a clause limiting responsibity is an absolute protection. A party accepting a trust undertakes a duty which he must discharge with a due regard to the interests of the parties having claims on the estate. The effect of the limiting clause will accordingly be superseded where there is *culpa lata*, *e. g.* by gross neglect on the part of one trustee to call another to account for sums due by him to the estate (*c*), or culpable mismanagement, in not timeously obtaining infeftment on a heritable bond (*d*). Personal or individual intromission, also, will be inferred from a joint discharge not followed up by investing funds uplifted from debtors, which are allowed to remain in the hands of one of the trustees until his insolvency (*e*). (3.) But when the clause is broadly expressed, referring not to legal acts but honourable conduct, *mala fides* or dishonesty must be alleged (*f*). (4.) The bankruptcy of a factor, who was habit and repute solvent at the time of his appointment, is not a result for which trustees having a limiting clause, with power to appoint factors, are responsible, unless they have been guilty of culpable negligence (*g*).

(*a*) DECLARING always, that my said trustees shall not be liable for omissions or neglect of management, nor for any factors to be named by them, and that they shall not be liable *singuli in solidum*, but each only for his own intromissions.

(*b*) See Thomson, 16th Feb. 1838, D.

(c) Moffat, 31st Jan. 1834, F. C., 12 S. 369.

(d) Mayne, 4th June 1835, F. C., 13 S. 870. See Grieve, 23d June 1835, F. C.

(e) Blane or Dean, 28th Jan. 1836, F. C., 14 D. 361.

(f) See Murray or Ainslie, 6th Feb. 1835, F. C., 13 S. 417.

(g) Cowan, 18th May 1836, F. C., and (13th May,) 14 D. 744.

328. PRECEPT OF SASINE.—Infeftment in favour of trustees can be given to those only who are named in the deed; (§ 74. 4); and consequently, although a conveyance in favour of persons to be assumed as trustees under a power of nomination or delegation, is sufficient to confer the office of trusteeship upon one so nominated, and probably to ground adjudication in implement, a feudal right can be completed only by means of a *nominatim* conveyance. This observation may be applied to a case which sometimes occurs in practice, where the truster, in the obligation to infeft and precept of sasine, authorises infeftment to be given to a trustee or trustees to be named by himself in a writing under his hand; for as this form necessarily implies the omission of the names of these parties in the dispositive clause of the deed itself, to which the obligation to infeft and the precept of sasine are merely relative, it is thought that infeftment under a new deed of nomination, cannot vest a feudal right in the persons nominated, unless it contain dispositive words and a separate precept of sasine.

329. INFEFTMENT.—(1.) The qualifications of a trust-right are effectual against singular successors, under a rule formerly noticed, (§ 84,) so long as it remains personal. But after infeftment, the feudal right can only be limited as in a question with singular successors, by the appearance of the qualifying clauses both in the instrument of sasine and the register. (2.) When duly completed, a trust for behoof of creditors makes their debts real if their names and debts be inserted in the sasine, and a trust of this nature cannot be recalled by the granter, unless with the consent of all the parties interested in it (*a*). (3.) Although trust is a mere burden on heritage, which is extinguished as regards the truster, when its purposes are fulfilled, (§ 325,) it follows, from the feudal

nature of the right, that a trustee holding a power of sale may give a valid title to an onerous purchaser; and it is advisable, therefore, when its purposes have been fulfilled, that he should denude of the trust. (4.) When the heir of the last surviving trustee is substituted, and he refuses to take up the character of trustee, it is thought that the principle of the decision in the case of Dallas (*b*) would apply, and that the heir might be compelled to permit a title to be completed in his person, and to renounce. But if the purposes have been fulfilled, the Court will, in an action of declarator against the heir, declare the trust at an end, and ordain the superior to grant precepts for the infeftment of the person having the reversionary interest (*c*). (5.) Where, again, the trust expires with the last survivor of the trustees, the feudal right, as being a trust-fee, cannot, it is thought, be taken up by his heir even for the purpose of being reconveyed to the truster. In this anomalous situation, the party having the equitable right is allowed to conjoin with it the feudal title by means of a declaratory adjudication (*d*).

(*a*) Bell's Prin. 1996-2001. See Bell's Com. 2. 490.

(*b*) Dallas, 21st Nov. 1710, M. 16,191.

(*c*) Dalziell, 11th March 1756, M. 16,204.

(*d*) Drummond, 30th June 1758, M. 16,206. See Gillespie, 11th March 1824, 2 S. 795.

CHAPTER VI.

ENTRY OF HEIRS.

TITLE I. FORMS OF ENTRY.

330. INTRODUCTORY REMARKS.—In Scotland the maxim, *mortuus sasit vivum*, which came into full operation in England on the abolition of military tenures in the reign of Charles II., has no place. Where the ancestor died vested and seised in the lands, the *right* descends to his heir; but the *title* must be connected with the infeftment in the ancestor's person, by a particular deed flowing from the superior, called simply a *precept* when granted by the Crown, and a *precept of clare constat* from its introductory words, when by a subject, followed by infeftment in favour of the heir named in the precept. The superior, although thus an interposed person, through whom the chain of connection must pass, between the deceased vassal and his heir, cannot control the transmission of the property to the latter. The form of the consent remains, although the power to withhold it has disappeared. Originally, when fees were granted for life only, the investment of the heir necessarily depended on the will of the superior. After they had become hereditary, the heir did not take the property as deriving any right from the ancestor, but under the obligation in the grant: the superior still retained important privileges, more particularly in wardholding, and the infeftment of the vassal was long regarded as a mere burden on the more eminent right of superiority. In this situation, the claim of the heir to an entry was personal only, the fee returning to the superior on the death of the vassal. But, in the course of time, when feudal notions gave place to the idea of a right of property, and the fee in the vassal acquired the appellation of a *dominium*, it was no longer held to return

to the superior, but to remain in the *hæreditas jacens* of the deceased vassal—a term borrowed from the Roman law to express the situation of a right which had left one individual, and had not yet been formally vested in another (*a*).

(*a*) Dalrymple's Feud. Prop. 190, 205, *et seq.* See Lord Kames's Report of Landale, 29th Jan. 1752, M. 14,465.

331. ORIGIN AND HISTORY.—1. *Precept prior in date to the service.*—(1.) As the forms used in the transmission of fixed property are changed with difficulty and by slow degrees, those which prevailed at an early period of our law in the entry of heirs are still employed with but slight modifications. The superior, in the infancy of the feudal system, granted investitures not only to new vassals, but renewed those which had fallen by death, in the persons of the nearest heirs, in presence of the *pares curiæ*. Where the propinquity of the heir was known to all, a formal inquiry would have been superfluous, and the investiture was of a simple description. Even after charters and precepts took the place of the *breve testatum*, there could still, in the great majority of instances, be no doubt as to the righteous heir; and it seems obvious, that precepts essentially of the nature of the modern precept of *clare constat*, must have preceded the form of entry by service. (2.) This form probably originated in the necessity imposed on the heirs of the immediate vassals of the Crown of producing evidence of their propinquity; and a writ, called a brieve of inquest, (*breve de inquisitione,*) proceeding upon the application of the heir, was issued from the Chancery of the Sovereign, or from a jurisdiction (*e. g.* a regality) having a right of chancery, directed to the Sheriff, for inquiring into the relationship of the heir. In the course of time, brieves came to be used when subject-superiors on any pretext refused to grant precepts for the infeftment of the heirs of their vassals. We find, accordingly, that Craig (*a*) supports this notion of what was probably the natural course of events. But, on the other hand, Mr Erskine (*b*), on what authority does not appear, regards the precept of *clare constat* as an anomalous mode of entry, hardly deserving of any effect as a link in the feudal chain; which is the more remarkable, that the feudal correct-

ness of entry by precept of *clare constat*, is shewn by an example of a Crown precept of *clare constat*, granted by James I. in favour of his son, Prince Charles, as heir of his mother Queen Margaret, in the lordship of Dunfermline (*c*).

2. *Service special and general.*—(1.) Service is frequently styled *aditio hæreditatis*, from its supposed resemblance to a form of the civil law, whereby an heir assumed or undertook the succession with all its liabilities. It is unquestionable, however, that an heir was not by the feudal law made liable for the debts of the ancestor; the passive title has been introduced by engrafting on our law the fiction, *hæres est eadem persona cum defuncto;* and his liability is founded, not on the bare fact of his being the eldest son, or otherwise the nearest heir of the deceased, but his taking as such the property which would, unless for his interference, go directly to the payment of the ancestor's debts. Accordingly, an heir is not liable *passive* if he take nothing by his service; and the obligation which he incurs is equally broad, by entering by means of a precept of *clare constat*. Service must thus be regarded more as a *quasi* judicial form for getting access to the subjects which belonged to the ancestor, where investiture cannot be obtained on the voluntary precept of the superior, or the right of the ancestor was personal, than as a proceeding adopted to declare his assumption of the succession, with its liabilities. The service of an heir on the brief of inquest may be in *general* or in *special*,—the special service being proper to subjects in which the ancestor died vested and seised, and the general service connecting the heir with the feudal clauses contained in unexecuted deeds of transmission, so as to enable him to take infeftment on the precepts of sasine, or resign on the procuratories of resignation contained in them. The general service likewise carries to the heir those heritable rights which are perfected without infeftment. (2.) It is in its modern shape only that the special service is to be regarded as the older form. Anciently, when the charter and sasine were contained in one and the same deed, and formed the infeftment or investiture, there was no room for the distinction between general and special service. The service and sasine were then parts of the same proceeding (*d*); and even after the

brieve of inquest was introduced, the inquiry appears to have been confined to the mere question of the propinquity of the claimant, who was, after a favourable verdict, entered by the superior's precept (*e*). It may be conjectured that the brieve received its additional clauses in order that the casualties of the superior, and the lands to which they attached, might be ascertained by the authority of an inquest presided over by the local judge appointed by the Crown, and that the service thus acquired the character and title of special. (3.) In the course of time it was perceived that the form of service might be farther useful both as a declaratory proceeding, and as fixing the *jus sanguinis*, and thus a title to possess those rights which, although heritable, do not require infeftment for their transmission. In this manner the general service, in its modern shape, most probably took its rise. It is based on the special, of which Lord Kames (*f*) calls it an awkward imitation, and proceeds upon a brieve identical in form with the brieve used for the special service. The introduction of the general service is referred by Mr Erskine (*g*) to the year 1532, or a period soon after; but the earliest general retour on record is dated in 1571. (4.) The modern service in special does not take out of the *hæreditas jacens* of the deceased the feudal right which was vested in his person: it merely empowers the heir to demand, and authorises the superior to grant precepts for new infeftment; and its effect, in a feudal sense, vanishes, if the heir die without having obtained infeftment. Although called an *inchoate* title, it is thus substantially a mere declaratory proceeding, since of itself it vests nothing in the heir, and it may be superseded by a voluntary precept granted by the superior. In these respects it materially differs from service in general, which transmits to and vests in the heir all personal rights; and these, although not feudalised in his person, will remain in his *hæreditas jacens* after his death, until taken out of it by service or adjudication (*h*). Such rights, and the unexecuted feudal clauses of the conveyances on which they stand, can only be acquired by general service. But the feudal fee may be renewed without the necessity of special service, by infeftment on a precept of *clare constat*. It is, however, to be observed, that special service, for reasons

to be afterwards explained, includes a general service, *ejusdem generis*, in the same character.

(*a*) Craig, 2. 12. 24; 2. 17. 22. See Sandford on Succession, 1. 272.
(*b*) Ersk. 3. 8. 71.
(*c*) Kames' Elucid. Art. 15.
(*d*) Ersk. 3. 8. 65.
(*e*) Additional Sutherland case, c. 1. p. 6; Retour of the Daughters of Duffgallus, on a brieve of Alexander III. in 1271. See opinion of Lord Medwyn in Cochrane, 11th March 1828, F. C., 6 S. 751.
(*f*) Kames' Elucid. Art. 13.
(*g*) Ersk. 3. 8. 65.
(*h*) Stair, 3. 5. 25; Bankton, 3. 5. 21.

TITLE II. SPECIAL SERVICE.

332. WHEN NECESSARY.—(1.) Special service is necessary in all cases where the fee in a Crown-holding is *in hæreditate jacente* of the last fiar, or the superior, when a subject, refuses to grant a precept of *clare constat* in favour of the heir. It is applicable to all rights duly feudalised, whether absolute or redeemable; for although the heir of the creditor in a real lien, which is a right not constituted by infeftment in the person of the creditor, but forming a burden on the infeftment of the debtor, may validly discharge the burden after serving in general, the rule is different with respect to proper rights of annualrent, or other securities by infeftment (*a*). The party competent to serve is the heir-at-law or of provision; and he must adopt the form of service, unless where the ancestor has made a direct conveyance in his favour. A conveyance to a stranger, even with feudal clauses, has not the effect to prevent the heir-at-law from serving in special to the deceased (*b*), although the superior is under no obligation to grant precepts in his favour; (above, § 148. 4.) (2.) It follows that, when the fee is full, service in special is incompetent. Where, accordingly, infeftment has been already obtained in virtue of a service however erroneous, if in the proper character, or the fee has been taken up by means of an infeftment *ex facie* formal and made public by confirmation, the righteous heir is excluded from serving in special, until he shall have reduced the invalid title standing in the person

of his competitor (*c*). But infeftment on a precept of *clare constat* not authorised by service, and therefore warranted by a mere arbitrary act of the superior, or on a conveyance *a non domino*, is insufficient to exclude service in special (*d*).

(*a*) Ersk. 3. 8. 63; Halkerston, Jan. 1729, M. 14,436 and 1799; Cuthbertson, 7th March 1806, M. App. *v. Service and Confirm.* No. 2.

(*b*) Suttie, 20th July 1733, M. 14,457; Douglas, 25th Nov. 1761, M. 14,457. See Colquhoun, 16th Dec. 1828, F. C., 7 S. 200; remitted, 5 W. S. 32; adhered to, 8th July 1831, F. C., 9 S. 911.

(*c*) Cuninghams, 27th Feb. 1812, F. C.

(*d*) See Maccallum, 21st Feb. 1793, M. 16,135; Lord Moncreiff in Rutherfurd, 12th Nov. 1830, F. C., 9 S. 3.

333. PARTICULAR CASES.—In the ordinary case of a fee-simple, or of a destination or entail duly feudalised, it is seldom that any difficulty can occur in judging of the necessity of a service in special. But when lands are held under a destination in fee and liferent, the question becomes more complicated.

Case 1.—A conveyance *to A. in liferent, and to B. in fee*, vests the fee in B. The liferent expires on A.'s death, and nothing remains in his *hæreditas jacens* to be taken up by service and new infeftment. (1.) The question may, however, occur on the words of a destination, what terms import a liferent? Lord Stair is of opinion that a conveyance *to A., and after his decease, to B. and his heirs*, imports a bare liferent in A. Dirleton and Stewart (*a*) dissent from this opinion, and the interpretation has been rejected by the Court. Thus, under a destination *to A., and failing him by decease, to B., &c.* the fee was held to be in A. (*b*). (2.) A liferent, where a fiar is named, does not become a feudal fee by the reservation of powers of disposal in favour of the liferenter. These fly off on his death; but a matrimonial fee in the husband with reserved powers, even where there is a proper *nominatim* fiar, becomes, by the reservation, a feudal fee in his person, which, on his death, must be taken up by special service. These powers attach to the fee, and give the substantial right of property to the husband (*c*).

Case 2.—(1.) Where the destination is *to A. in liferent, and to the heirs of his body in fee*, and is followed by

infeftment in these terms, made public by confirmation, the fee, according to a rule above explained, (§ 295. 1,) is vested in A.; and it seems to follow, that on his death, the heir of his body must take up the succession by service to him as heir of provision, the granter having been divested by the infeftment. (2.) If the fee in the parent is made fiduciary by the use of the taxative term allenarly, or an equivalent term, the right in a feudal sense is the same. It is true that the parent holds the property as trustee for his heir; but the fee is not a proper trust-fee burdened with the conditions of the trust, which is personal to the individuals named, and does not descend to the heir of a trustee without an express substitution. Here, the sole interest is in the heir, and it seems no great stretch of construction to regard him as a proper substitute of the fiduciary fiar. It is therefore thought that the fee may be taken up by special service as heir of provision to the fiduciary fiar, and that the form of a declaratory adjudication is inapplicable to the circumstances (*d*).

Case 3.—In destinations with substitutions, when the institute is infeft, the next substitute will take by service as heir of provision in special. Infeftment given during the lifetime of the institute to one whose true character is that of substitute, vests nothing in him, and cannot therefore supersede the necessity of service. The law recognises a joint fee in several proprietors *pro indiviso*, each having right to a share of the common subject; but not a successive fee in two or more disponees in their order, each having right to the whole by one and the same infeftment (*e*).

(*a*) Dirleton and Stewart, voce *Heirs of Prov. and Subst.*

(*b*) Hamilton, 10th June 1714, and 21st Jan. 1715, M. 14,360-2.

(*c*) Wilson, 14th Dec. 1819, F. C. See opinion of Lord Glenlee.

(*d*) See Dundas, 23d Jan. 1823, 2 S. 145; Frog, 25th Nov. 1735, M. 4262.

(*e*) Livingston, 3d March 1763, M. 15,409; Ker, 12th Feb. 1708, M. 14,357; M'Culloch, 10th July 1731, M. 14,366.

TITLE III. GENERAL SERVICE.

334. WHEN NECESSARY.—(1.) As the special service is the first step in taking the feudal right out of the *hæreditas jacens* of the ancestor, so is the general service a preliminary in com-

pleting a title in rights which were vested in one deceased, such as reversions, servitudes, &c. which require no sasine, real liens, which burden the infeftment of the debtor, or personal rights, which, although requiring sasine for their completion, had not been perfected by sasine in the person of the ancestor—as heritable bonds, dispositions, adjudications not feudalised, even although followed by a charge against the superior, &c. and consequently procuratories of resignation and precepts of sasine still unexecuted (*a*), as well as precepts *a me*, followed by infeftments unconfirmed by the superior (*b*). (2.) The party must be a proper heir, whether of law or of provision, and not a disponee or institute; and even in a proper conditional institution, the disponee takes without service. To enable an heir of provision to take by service, the deed must contain effectual words of conveyance. Thus, a destination in favour of A. and his heirs-male, followed by a declaration, that after their failure, B. and his heirs-male should succeed, would be inoperative as to B. and his heirs, the words of conveyance being awanting; at least a service would not be competent to B. or his heir, although he might probably be entitled to recover on a decree of constitution, or by declarator and adjudication in implement against the next heir under the existing investiture. (3.) Service, in general, is indispensable in order to put the heir in the place of the ancestor, and thus enable him to exhaust the unexecuted feudal clauses of deeds of conveyance, by inserting his own name in the charters and infeftments following upon them. It cannot be superseded by a precept from the superior, who has no power to discharge the procuratory or precept of the ancestor. The test of the competency of special service being the vesting of the substantial right of fee, so that of the necessity of general service is the position of the personal right. The rule is, that the heir must serve to the ancestor in whom the personal right was last vested, either by a *nominatim* conveyance, or by general service to his ancestor. This rule and its exceptions are explained by the following cases.

(*a*) See 1693, c. 35, above, p. 100; Ersk. 2. 12. 31; 3. 8. 63; Cuthbertson, 7th March 1806, M. App. *Serv. and Conf.* No. 2.

(*b*) Douglas, 10th July 1713, M. 3008.

335. PARTICULAR CASES.—*Case* 1.—(1.) The simplest form of service is by the heir of line of the grantee in the ordinary disposition of sale who had died without executing the feudal clauses in the deed. But let it be supposed that the conveyance was by *A. to B., whom failing, to C.;* or by A. *to himself, whom failing, to B.;* or by A. *to himself and the heirs-male of his body, whom failing, to B.;* B. is thus the heir of provision in place of the heir of line. In either case the personal right must be taken up by general service (*a*). (2.) The terms of the destination being the same, viz. *to A.,* (*or to A. and the heirs of his body,*) *whom failing, to B.,* and it being assumed that A. predeceased the granter, (and without leaving issue, if his heirs have been included,) B. will still serve as heir of provision in general to A., provided the conveyance was perfected by delivery before the death of A.

Case 2.—But take the case of a destination in a *mortis causa* disposition *by A. in favour of the heirs of his body, whom failing, to B., &c.* that the granter survives the heirs of his body, and that B. survives the granter. It is obvious that a conveyance in these terms could not have been feudalised even during the lifetime of the granter, because infeftment to heirs unnamed or unborn is inept; nor is the difficulty removed by the failure of heirs of A.'s body. For although the personal right vests in the *nominatim* substitute B., an obstacle of a practical nature exists under the terms of the statute which regulates the mode of executing feudal clauses after the death of the granter (*b*). That statute prescribes, that "the titles "of those in whose favours the resignation is made, and to "whom the sasine is granted, be deduced" in the instruments of resignation or sasines, under the sanction of nullity. But as the notary has no warrant for stating in the instrument that the heirs of the granter's body have failed, he cannot deduce in it the title of the *nominatim* substitute (*c*). Consequently the fact of the non-existence of heirs of A.'s body must be established by some mode of investigation, but whether by means of general service or an action of declarator, or indifferently by either, has not yet been conclusively determined. In an early case, service in general to the granter was in similar circumstances sustained (*d*); but doubts have been

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entertained of the soundness of the decision (*e*). In such circumstances the proceeding (whether by service or action) is plainly of a declaratory nature: it cannot transmit a right, because none remained in the person of the granter; and as a proper service it would be inept and ineffectual (*f*).

Case 3.—The same necessity for a declaratory proceeding obviously exists where the destination is *to A., whom failing, to B.*, and A. predeceases the granter without having obtained delivery of the disposition. The predecease of A. cannot be assumed by the notary, nor can B. serve in general to A., in whom no right had vested.

Case 4.—(1.) The case assumed in Art. 3. may be much complicated by the introduction into the destination of the heirs of the substitutes. Thus, under a conveyance *to A. and the heirs of his body, whom failing, to B. and the heirs of his body*, &c. the granter having survived A. and his heirs, but predeceased B., who neglected to complete a title under the deed, the question arose, in what form C., the heir of B., behoved to make up his title. Here the right vested in B. on the granter's death; but the same obstacle which has been noticed in Case 3. would have barred infeftment in his favour without service or declarator, and the difficulty was necessarily increased in the person of his heir. The mode deemed competent in these circumstances, by the majority of the Court, (although the form of the case did not admit of a determination of the question,) was by declarator at the instance of C., that B. was disponee in the destination by the predecease of A. and the heirs of his body, followed by the service in general of C. to B., as the substitute last vested with the personal right. Service directly to the granter was rendered incompetent by the vesting of the personal right in B. (2.) The same form of proceeding will obviously apply to the case of a destination by A. *to the heirs of his body, whom failing, to B.*, when the heir of A.'s body survives the granter, but dies without having made up a title. Under the opinion of the Court, B. will establish by declarator that the right vested in the heir of A., and afterwards expede a service to him as heir of provision in general (*g*).

Case 5.—Let it be supposed that the circumstances stated in Art. 5. are still farther varied; that none of the

persons called by name to the succession survived the entailer, but that the substitute in right on his death, is an heir called under the general designation of heir-male of the institute. In a recent instance, this heir-male carried through a general service to the institute, (who had predeceased the granter without, as it appeared, receiving delivery of the conveyance,) and thereupon brought an action of declarator to have it found, that in virtue of his service he had the only good and effectual title to be infeft in the lands; *or otherwise*, that by the predecease of the institute and a preceding substitute, he, the heir-male, might take up the succession either as conditional institute or disponee, or as heir of tailzie and provision to the entailer, and expede a service in this latter character. The Court declined to advise the heir-male in regard to the correct mode of completing his title; but on the summons being restricted to the first set of conclusions, to which no objection was stated by the substitutes in the destination, the Court found, in conformity with these, that he was entitled to infeftment under the service which he had already expede to the institute (*h*). These several instances plainly, therefore, depend on the same principle, and only differ in the greater or less complexity of the terms of the destination. It is difficult, or rather impossible to deduce from them any practical rule for the guidance of the conveyancer. The safest course manifestly is to follow the procedure suggested in the case of Colquhoun, as closely as circumstances will permit.

Case 6.—Another example of a declaratory proceeding occurs in the case of a conveyance to heirs *nascituri*. Put the case of a settlement on *the heirs of the body of the granter*. The feudal incompetency of giving infeftment to a person unnamed renders certain steps necessary in order to identify the party who has right under the conveyance (*i*). In practice, it is not unusual to complete the title of the granter's heir by service (*k*), and it can seldom occur that a party exists who has an interest to question the formality of the proceeding. But it is by no means clear that service is the competent course. The heir of the granter's body is such only *designative*; in a feudal sense he is a disponee. The case differs

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in form, but apparently not in principle, from that of the succeeding substitute in a destination by *A. to the heirs of his body, whom failing, to B.* This shape of the clause is noticed in Art. 2. of the present section, and under it, a service at B.'s instance to the granter might be unsafe, after the opinion of the majority of the Court in the case of Colquhoun. In both instances the granter is divested.. The case under consideration affords less ground than even that of Gordon of Carleton, for maintaining that service is a competent form. The service in the case of Gordon was sustained as equivalent to a declaratory finding that the intermediate members of the destination had predeceased the granter; but here there is no question as to the heir entitled to take; he is the immediate issue of the body. The point may perhaps be considered as settled, and that the proper course of proceeding is by adjudication in implement or declarator (*l*).

Case 7.—Service is unnecessary at the instance of a proper conditional institute; (above, § 245. 2.) Thus, under a conveyance by *A., failing heirs of his own body, to B.*, the heirs of A. have their right *reserved*, and not *conveyed*. B. is a disponee under a condition, and that condition being purified, he may take immediate infeftment under the conveyance.

Case 8.—Heirs or children of a marriage having *jus crediti*—a right to enforce an obligation in the contract to invest money or execute a conveyance of lands, or to challenge deeds *in fraudem* of the contract, require no service; but where a feudal title is to be completed, or a personal right to be taken up, service must be expeded according to the circumstances (*m*).

Case 9.—Service is unnecessary by a party, whether the heir-at-law or a stranger, having *jus crediti* under a trust-conveyance. The fee being vested in the trustees subject to the purposes of the trust and the claims of those having an interest under the deed, the latter take not as heirs, but as creditors (*n*).

Case 10.—General service may become necessary from a defective or limited infeftment. (1.) As a precept of sasine is not exhausted by the act of infeftment, unless the instrument of sasine be valid and also duly registered, (above, § 83,)

it follows that the right remains personal, and must be taken up by general service. (2.) Let the case be supposed of a destination by *A. to B., his eldest son, for his liferent use only, (or allenarly,) and to the heir-male of his body in fee;* that a charter of resignation is obtained from the superior in the like terms, on which B. is infeft, but that his sasine is limited by the words, *liferent state and sasine*, which import infeftment in a bare liferent only, and not in a fiduciary fee; (see § 320.) But as a destination in the terms supposed gives a right of fiduciary fee to the father for behoof of his children, service in general to B. by his heir-male will carry the personal right of fee on the expiry of the liferent by B.'s decease. The same proceeding will be followed where the exclusion of the term, allenarly, has made the fee in B. not fiduciary but absolute, and the infeftment has been limited to a liferent; (see as above.)

(*a*) See Colquhoun, as in (*g*); and Mackenzie, as in (*e*); Macculloch, 10th July 1731, 14,366; Hay, 30th June 1758, M. 14,369, B. S. 5. 351.

(*b*) See 1693, c. 35, above, p. 100.

(*c*) Peacock, 22d June 1826, F. C., 4 S. 742. The destination was by A. *to the heirs of his body, whom failing, to B.*, and B. obtained infeftment without having adopted any proceeding for having it ascertained that A. left no issue. The decision was that this infeftment was invalid; but there was no finding that service was either necessary or competent, nor does it appear that there was any decided opinion expressed whether service or declarator was the correct form.

(*d*) Crs. of Gordon, 8th Feb. 1748, M. 14,368; Kilk. Report. The form of the destination was by A. *to the heirs of his body, whom failing, to B.*, &c. *and the heirs-male of their bodies.* The granter having died without issue, B. served to the granter, and the service was sustained as effectual.

(*e*) See Colquhoun, as in (*g*); Peacock, as in (*c*). See Mackenzie, 24th Nov. 1818, F. C.

(*f*) Ersk. 3. 8. 73; and case of Mercer referred to; Dennistoun, 5th Feb. 1824, 2 S. 678.

(*g*) Colquhoun, 16th Dec. 1828, F. C., 7 S. 200; remitted, 5 W. S. 32; adhered to, 8th July 1831, F. C., 9 S. 911. See Mackenzie, as in (*e*).

(*h*) Murray, 21st May 1833, F. C., 11 S. 629. The destination was by A. *to himself in liferent, and to B., his nephew, in fee; whom failing, to C., the brother of A.; whom failing, to the heirs-male of the body of B.;* whom failing, to other substitutes.

(*i*) See Peacock, as in (*c*).

(*k*) Lord Pitmilly in Peacock, as in (*c*). See Logan, 20th Dec. 1836, F. C., 15 D. 291.

(*l*) Cameron, 18th Nov. 1784, M. 12,879.

(*m*) Ersk. 3. 8. 40; Campbell, Jan. 1742, M. 12,865; Anderson, 16th

Nov. 1747, M. 12,868; Moncrieff, 8th Dec. 1759, M. 14,418 and 12,871; Ogilvie, 16th Dec. 1817, F. C.

(*n*) Gordon's Trs. 4th Dec. 1821, F. C., 1 S. 185; Russell or Macdowall, 6th Feb. 1824, F. C., 2 S. 682; Leitch's Trs. 2d June 1826, F. C., 4 S. 659; affirmed, 17th Feb. 1829, W. S. 2. 366.

336. TENTATIVE TITLE.—General service is effectual as a *prima facie*, or as it is styled, a *tentative* or *putative* title, in the person of one who claims a right to a subject to which another has made up a feudal title (*a*). A tentative title of another description, by trust-bond and adjudication, has been recognised by statute (*b*). (See *Trust-Adjudication.*) (1.) Service for the purpose of establishing a tentative title is strictly of a declaratory nature, and must be in the precise character in which the right to be vindicated descends to the party serving. Thus, a service as heir of line in general is not a title to pursue reduction of an infeftment in lands destined to heirs of provision (*c*). (2.) This kind of service seems competent or necessary only, where the investiture to be challenged has proceeded upon a conveyance from the ancestor, and against which he had himself a right of action; and it vests in the heir that right of action only, and no immediate right which is capable of being feudalised. If the right of action depends on a *jus crediti*, *e. g.* where the heir under a marriage-contract, or a substitute of entail, seeks to reduce deeds executed in the one case, *contra fidem tabularum*—in breach of the contract, and in the other in contravention of the entail, service is not requisite. In like manner, an heir of provision challenging, on the ground of illegitimacy, the *status* of a prior possessor of the estate, who had made a settlement to his prejudice, may sue on his bare right of apparency (*d*). (3.) But a tentative service otherwise competent has been held to be excluded by a prior service to the ancestor in general, or even in special in the same character, (for a special service includes a general *ejusdem generis*) (*e*). The practical effect of this doctrine, if considered to be finally established, will probably be to introduce, of necessity, the form of declarator without even a *prima facie* title in the heir, wherever the investiture to be challenged has proceeded upon a service either general or special, unless he can con-

nect himself by general service with an ancestor whose relationship necessarily implies the fact of the heir being likewise the heir of that ancestor to whom the former service had been expede (*f*). Originally, indeed, the general service for a tentative purpose was sanctioned on the sole ground of necessity, because service in special is incompetent when the fee is full (*g*); and prior to the case of Cochrane, its competency, even after a service to the same ancestor had been already expeded, does not appear to have been questioned (*h*). The case is manifestly different where personal rights have been carried by the prior service. These having been taken out of the *hæreditas jacens* of the ancestor, and vested in the heir first served, a second service would be plainly inept as a proper general service.

(*a*) Meikle, 18th Nov. 1634, M. 16,091; Strowan, 26th Feb. 1681, M. 16,096; Horns, 6th Nov. 1746, M. 16,117.

(*b*) See 1695, c. 24, above, p. 206.

(*c*) Maccallum, 21st Feb. 1793, M. 16,135.

(*d*) See Rutherfurd, 12th Nov. 1830, F. C., 9 S. 3.

(*e*) Cochrane, 11th March 1828, F. C., 6 S. 751; reversed, 29th April 1830, 4 W. S. 138. See, in particular, opinions of Lords Balgray and Medwyn.

(*f*) See Anderson, 22d June 1832, F. C., 10 S. 696. The sufficiency of the service to give a title by implication is assumed in the note of the Lord Ordinary (Moncreiff,) but the Court reserved the point. See Rutherfurd, as above.

(*g*) Horns, 6th Nov. 1746, M. 16,117.

(*h*) See Carmichael, 15th Nov. 1810, F. C.

TITLE IV. FORMS IN THE SPECIAL SERVICE.

337. BRIEVE (*a*).—Service proceeds upon a brieve, called a brieve of inquest, *(breve de inquisitione,)* which, whether intended as the warrant for a special or a general service, is of one uniform style. It varies only as respects the degree of propinquity of the claimant; the character in which he claims, whether as heir of line, of conquest, or of provision; and the Judge to whom it is directed. The brieve is in Latin. It consists of seven parts or heads, adapted to the several points of inquiry. These shall be noticed under the *claim of service;* (below, § 340, *et seq.*) The brieve is authenticated by the subscription of the Director of Chancery, or his depute or substitute, and is addressed, when the service is to be in special,

to the Sheriff of the shire in which the lands lie, or to the Sheriff of Edinburgh acting under a commission from the Court of Session; (see below, § 352.)

(*a*) Jurid. Styles, 1. 374.

338. EXECUTION OF THE BRIEVE.—(1.) The brieve is executed edictally at the market-cross of the head burgh of the jurisdiction within which the service is to proceed. The summoning of the inquest was appointed to be on fifteen days, by a statute of great antiquity (*a*). By a later statute (*b*) the same *inducia* are prescribed for the proclamation of the brieve; but, if presented to the Sheriff or Bailies at the head-court, it was appointed "to be served incontinent." In another enactment (*c*), a distinction is made between the citation of the inquest and the proclamation of the brieve. The latter, as the legal form of advertising those having an interest adverse to the claimant, is enjoined; but the jurors are allowed to be immediately called, if present in court; and by the present practice they are never formally summoned. The power of summary service was thus taken away. (2.) The proclamation is by a sheriff's officer, and ought to be "in plain mar-"ket, where most confluence of people is gathered (*d*);" but if the brieve falls to be served so near the term of Martinmas or Whitsunday that fifteen days do not intervene, (the day of citation or day of compearance being one of the fifteen,) the brieve may be proclaimed on any week-day, the officer and six others of the town being present. (3.) It is not necessary to cite any party in virtue of the brieve; but one having interest may, by petition, obtain an order upon the Directors of Chancery to insert a clause in any brieves issued by them for the special citation of the applicant (*e*). (4.) The execution bears in practice with continuation of days (*f*); but if a special day is expressed, the diet is peremptory, and an adjournment incompetent unless with the consent of the claimant (*g*).

(*a*) Rob. III. c. 1.

(*b*) 1429, c. 127. ITEM IT IS ORDAINED that the samin statute maid upon the proclamation of inquests be keiped upon the brief of saising that is to say gif the brief be presented to the Schireffe or Baillies in the head court that it be served incontinent And gif it be presented on ane uther daie or outwith Court that it be cryed on fifteene dais' warning And gif it be neir hande the *Whitsunday* or *Martinemes* the sasing sal be given and the partie contrary sall

be privileged to break saising of fee and heritage fyfteene daies after and of conquest fourtie daies after that so that the breaker be in saising thereof of before.

(*c*) 1503, c. 94. ITEM it is STATUTE and ORDAINED that because there hes bene in times by-gane great abusion in the proponing of exceptions frivol against the brieve of inquest and perverted the ordour and nature of it as it were ane brieve of pley Therefor for the eschewing of sik frivol exceptions in time to cum it is STATUTE and ORDAINED that na exceptione avail against the said brieve of inquest it beand cryed openly upon fifteene daies with the indorsing of the officiar that cryed it contenand twa witnesses and his sele or signete bot the exceptions followand allenarly THAT IS TO SAY against the judge against the inquest and the exception of bastardie and that to be proponed in the forme of auld law AND as anent the exception maid apon the summounding of inquest upon fifteene daies before after the form of the statute of King *Robert* quhilks maks mention that the inquest sould be summound upon fifteene daies before it sall be leifful notwithstanding the said statute to the Scheriffe or any other officiar that is judge to the brieve of inquest to summound the said inquest upon quhat daies he pleasis or upon short time notwithstanding the said statute and gif they be present in the tolbuith unsummounded so that there be na uther lauchful exception against them it sall be leifful to the Scheriffe or officiars to compel them to passe upon the said inquest AND ATTOUR because there hes bene ane abusion in the crying of the Kingis brieves in stewartries and bailliaries quhair they were cryed at ane hill na confluence of people being there throw the quhilke na knowledge theirof might cum to the partie Therefore it is STATUTE and ORDAINED that all maner of brieves of inquest sall be cryed at the mercat-croce of the burgh openly in plain mercat quhen maist confluence of people is gaddered swa that the crying thereof may cum to the knowledge of the partie defender quhair it suld be served and quhat day And that the said brieve be thrice cryed plainly togidder and betwixt ilk crying the space of all the three cryingis And that all officiaris of the town be warned to compear at the said proclamation to bear witnesse AND gif it sall happen that the antecessor of ony claimand right decease sa nere the terme of *Whitsunday* and *Martinmes* that the persewer may not get it upon ane mercat day for nearenes of the term of *Whitsunday* or *Martinmes* in that case it sall be leifful to him to gar cry his brieve upon ony wolk day swa that he have the officiaris of the towne and part of the honest persones to the number of sex persones salfand to our Soveraine Lord his warning upon fourtie daies after auld use and consuetude.

(*d*) 1503, c. 94, as above; Stair, 3. 5. 30.

(*e*) Stair, as above; Erak. 3. 8. 60; Meldrum, 10th Nov. 1696, B. S. 4. 327.

(*f*) Jurid. Styles, 1. 375.

(*g*) Ogilvie, 25th Feb. 1595, M. 14,423. See Sutherland, Jan. 1743, M. 16,347.

339. PRELIMINARY PROCEDURE.—1. *Jury.*—After the expiry of the *inducia*, the brieve and executions are presented to the Sheriff in a court held by him under the authority of the brieve. A jury is then empanneled, consisting of fifteen

persons; but for this number there seems no other authority than inveterate custom (*a*). The jurors were originally the *pares curiæ*, or co-vassals of the ancestor. Afterwards those were admitted on the inquest whose rent exceeded L.40 Scots, although neither co-vassals nor even resident in the neighbourhood (*b*). But, for a long period, all persons of mature age, and not legally incapacitated, have been received as jurors, and they may competently give evidence as witnesses. It is sufficient that a majority concur in the verdict (*c*).

2. *Preliminary objections.*—At this stage, an opposing party, whose interest is allowed, may be heard upon objections in point of form, provided they are capable of instant verification, for the brieve of inquest is not a pleadable brieve or brieve of plea (*d*). (1.) He may object that the brieve is "razed or blobbed in suspect places, that is to say, in the "name and the surname of the follower (claimant) and of the "defender, and the name of the land or of the cause upon "which the brieve was purchased, and the date (*e*)." (2.) Similar objections are competent against the executions; but the objector cannot suspend the proceedings by means of an action of reduction-improbation of an *ex facie* regular execution (*f*). (3.) The opposing party may plead on an exclusive title, and by shewing that the fee is full, he is entitled to have the claim dismissed (*g*). But the proof must be by a sasine proceeding on the precept of the true superior authorised by special service, or on that of the ancestor confirmed by the superior (*h*). It is not enough to produce a sasine on a subaltern right granted by the deceased, or even on a disposition of sale, for until the mid-superiority created by infeftment on the indefinite precept be evacuated by confirmation, there is no feudal obstacle to the entry of the disponer's heir (*i*). And it is manifest that the production of a deed of conveyance by the ancestor not feudalised can be no bar to the special service of the heir of line (*k*.) (4.) He may stop the service by producing a retour of his own service in special to the ancestor in the lands expressed in the claim. (5.) He may, under the statute of 1503, propone the objection of bastardy; but, to be entitled to state this objection, it is thought the opposing party must be in possession of a gift of *ultimus hæres*.

(*a*) Craig, 2. 17. 27; Stair, 3. 5. 31; Ersk. 3. 8. 59.

(*b*) Craig, 2. 17. 28.

(*c*) Stair and Ersk. as in (*a*); Jurid. Styles, 1. 376; Anderson, 29th Dec. 1649, B. S. 1. 447. See Dunipace, 5th March 1554, M. 14,422.

(*d*) 1503, c. 94, above, p. 457; Ersk. 3. 8. 60.

(*e*) 1429, c. 113. See Leslie, 17th Jan. 1758, B. S. 5. 862; 1503, c. 94, as in (*d*).

(*f*) Stair, 3. 5. 33.

(*g*) Laird of Strowan, 26th Feb. 1681, M. 16,096; Cuningham, 27th Feb. 1812, F. C.

(*h*) M'Callum, 21st Feb. 1793, M. 16,135.

(*i*) Fullerton, 22d Nov. 1833, F. C., 12 S. 117.

(*k*) Suttie, 20th July 1733, M. 14,457; Douglas, 25th Nov. 1761, M. 14,457.

340. CLAIM (*a*).—If objections of a preliminary nature be not stated, or if stated be not sustained, the heir or his procurator proceeds to instruct the claim of service. The claim follows *seriatim* the heads of the brieve, and must be subscribed by the claimant, or by his attorney or commissioner specially authorised by a probative mandate or commission (*b*). The claim thus consists of seven heads.

(*a*) Jurid. Styles, 1. 378.

(*b*) Jurid. Styles, 1. 372-3.

341. FIRST HEAD (*a*).—This head of the brieve and claim describes the claimant, and states the death of the ancestor at the faith and peace of the Queen. It contains likewise the feudal subjects in which he died infefted, and expresses the titles on which they were vested in the deceased. (1.) The death of the ancestor is usually notorious; but when it has occurred in a foreign country, it must be established, to the satisfaction of the jury, by witnesses, or the declarations or testimonies of the magistrates or of respectable inhabitants of the place where he died or was buried, or supported by common fame, in regard to one who has perished or been killed (*b*). If the alleged death was accidental and recent, a jury cannot be too guarded in acting upon merely circumstantial evidence. (2.) The *title* necessary to establish the right of the ancestor and verify the description of the lands will vary according as he was an heir, or disponee, or a vassal by recent constitution, or an adjudger. If an heir, the precept of the superior and sasine following on it will be produced; if a

disponee, the disposition, sasine and charter of confirmation, or charter of resignation and sasine; if a vassal, the feu or blench charter, disposition or contract; and if an adjudger, the title by which the right was completed. But it is not usual to expede special service except in Crown-holdings; the customary form of entry in lands held of a subject-superior is by precept of *clare constat*. (3.) The sasine must bear to have been duly registered, since a sasine unregistered does not vest the party with the fee; (above, § 83.) (4.) No evidence is produced of the averment that the ancestor died at the faith and peace of the Queen, which is presumed, if not disputed; and actual rebellion is the only competent objection (*c*).

(*a*) *First head of brieve.*—VICTORIA Dei Gratia Britanniarum Regina Fideique Defensor. Vicecomiti et balivis suis de SALUTEM: Mandamus vobis et præcipimus quatenus per probos et fideles homines patriæ per quos rei veritas melius sciri poterit magno sacramento interveniente diligentem et fidelem inquisitionem fieri faciatis DE QUIBUS TERRIS et annuis reditibus cum pertinen. quond. A. pater B. latoris præsentium obiit ultimo vestit. et sasit. ut de feodo ad fidem et pacem nostram infra dict. vicecomitat.

First head of claim.—HONOURABLE PERSONS and GOOD MEN OF INQUEST unto your wisdoms say I, A. eldest lawful son of the deceased B. that the said B. my father died at the faith and peace of our Sovereign Lady Victoria last vest and seised in the fee of All and whole *(the lands)* conform to a charter thereof &c. (the titles of the last investiture described, and clause of dispensation, if any, inserted.)

(*b*) Ersk. 3. 8. 66; Stair, 3. 5. 34.

(*c*) Ersk. as above.

342. SECOND HEAD (*a*).—The next point of inquiry is the propinquity of the claimant. (1.) The claim will set forth that the claimant is nearest heir to the deceased either by law or the will of the ancestor, (*proximus hæres provisione legis vel hominis*,) and the precise character in which the party appears before the inquest will be stated. But in judging of questions arising out of an erroneous specification of character, a material distinction is to be observed between the special and the general service. The former is not confined to an inquiry into a mere abstract proposition, whether the claimant is heir to the deceased in a certain character, but relates principally to a particular subject described in the claim, as contained in certain specified title-deeds. The lands and the progress of

titles expressed in the claim serve thus to remove any doubt or uncertainty in the specification of the claimant's character, since the jury will not serve him heir in particular lands, unless satisfied that he is heir of the investiture. It is therefore thought, that where there is no positive inconsistency between the character in which the claimant is served and the true character which he holds, the service will be valid. Thus, a service as heir of provision in certain lands appears to be a good service of a claimant who is truly heir of line (*b*); although service as heir of line, where the claimant is an heir of provision, would be invalid, because the evidence necessary to establish the former would be inapplicable to the latter character. Thus, also, service as heir of conquest or heir-male of a party whose proper character is that of heir of line, would perhaps be sufficient if the two characters should actually (although they do not necessarily) meet in the claimant. The question seems indeed to resolve into one of identity; but it is the plain duty of the man of business to describe with precision the character of the heir. (2.) The legitimacy of the heir is presumed, unless challenged (*c*); (see below, § 348. 2.) (3.) The propinquity stated in the claim is in like manner presumed, when a nearer is not either notorious or actually established (*d*). If the death of the ancestor has been recent, the alleged propinquity will be supported by two witnesses at the least, who may be jurymen. They must depone to the fact of the claimant being son, brother, nephew, &c. of the deceased, as the case may be. In a special service it can seldom happen that the propinquity is remote. Every link in the chain of connection must be set forth in the claim, and established in evidence (*e*). It is manifest that in a service of an heir of provision, called *nominatim*, a proof of propinquity is inapplicable. The right of succession being established by the title-deeds, it is only necessary to prove the failure of the intermediate substitutes.

(*a*) *Second head of brieve.*—Et si dict. B. sit legitimus et propinquior hæres dict. quond. A. sui patris de dict. terris et annuis redit. cum pertinen.

Second head of claim.—And that I the said A. am eldest lawful son and nearest and lawful heir to the said deceased B. my father in the said lands and others above described.

(*b*) Bell, 21st June 1749, M. 14,016-19. This was a general service, and

in the claim the lands were expressed, which was held to remove all doubt as to identity.

(*c*) Stair, 3. 5. 35; Ersk. 3. 8. 66.

(*d*) Stair, Ersk., as above.

(*e*) Same refer.; E. of Cassilis, 22d July 1629, M. 14,423.

343. THIRD HEAD (*a*).—The statement in this head of the claim, that the claimant is of lawful age, is now mere style. During the existence of wardholding, an heir in minority could not demand an entry from the superior, unless under an express provision in the charter, since he was considered unfit for military service; and the brieve therefore contained a warrant to inquire if the heir was of lawful age.

(*a*) *Third head of brieve.*—Et si sit legitimæ ætatis. *Third head of claim.*—And that I am of lawful age.

344. FOURTH HEAD (*a*).—1. *Opinions respecting the old and new extent.*—This head of the claim and brieve relates to a subject of considerable difficulty, and which has afforded much scope for the ingenuity of our writers. In the brieve the question put is, "*Quantum valent dict. terræ* NUNC *per annum et* "*quantum valuerunt* TEMPORE PACIS." (1.) Craig is of opinion that the terms, *nunc, et tempore pacis,* as referring to the old extent of lands, *(antiquus extentus,)* which was the true value at the period when it was estimated, and the new extent, *(novus extentus,)* which differed according to the soil and culture of the several districts of the kingdom, meant, the former, the time of our ancestors *who now rest in peace,* and the latter, the valuation in use at the date when he wrote (*b*). This definition is vague and unsatisfactory. (2.) Lord Stair (*c*), on the other hand, adopts a view which is expressly rejected by Craig. "The casualties of superiority," (says Stair, after adverting to the notion of Craig,) "were of old the chief "patrimony of the Crown of Scotland, and were further ex- "tended than of late; and, therefore, it seems that the time "of making the new retour and cause thereof was the fre- "quency of war requiring an addition to the royal revenue. "And though, through the alteration of the rate of money, "neither of the retours be now considerable, yet doubtless "they were very considerable in these times. So that by

"*quid valent nunc* is to be understood *in the time of war*, at "which time the new retour was made, which is more evident "from the opposite member which is the value *in the time of* "*peace*." (3.) But the generally received explanation of the terms, *nunc valent et quantum valuerunt tempore pacis*, is that given by Lord Kames, and adopted by Mr Erskine (*d*).

2. *Old extent*.—It is conjectured by Lord Kames that the old extent is the value of the lands in the kingdom, ascertained by a general census or valuation which appears to have been taken by Alexander III. about the year 1280. That extent was never permanently superseded, but continued, until a comparatively recent period, to be the rule for proportioning the public subsidies chargeable against landholders, as appears by a tax imposed so late as 1633. The insertion of the old extent in retours came probably to be enjoined, in order to furnish the officers of the Crown with authentic evidence of the valuation on which each landholder was to be rated both for public subsidies and the casualties of superiority. In 1326, an indenture or agreement passed in Parliament between Robert I. and his freeholders (*e*), whereby, on the recital that the Crown revenue had been greatly lessened by the recent wars, they granted to the King the tenth of their rents according to the census of King Alexander, but under the condition, that in lands which had been devastated by the war, the proprietors were to be allowed such an abatement as should be settled by an inquest. The circumstances under which this agreement took place seem thus to furnish a natural explanation of the terms of the brieve, whether we refer the words *tempore pacis* to the agreement itself, or to the peace recently before concluded between the two kingdoms —the word *pax* having both meanings. The new valuations thus provided for in a portion of the lands in the kingdom are supposed by Lord Kames to have received the designation of the new extent; but it is certain that they do not form what we now style by that name. It appears from old retours, that in the course of time an injunction to the Sheriff came to be introduced in brieves of inquest, to return both the former and the existing rents of the lands, and that the latter were not always under, but frequently above, the old extent (*f*).

From this it is manifest that these new valuations could not have proceeded upon the indenture with King Robert; and it is probable that by this time the non-entry and relief duties had come in many instances to be estimated by a new valuation taken by the inquest, and inserted in the retour, whilst the old extent, or an occasional general census, regulated the imposition of public taxes. A general valuation, we know, took place in 1424 (*g*), for levying the sum payable to England for the education and maintenance of James I.; and it is conjectured by Mr Erskine (*h*), that a prior census had been taken about the year 1365 or 1366. These later general valuations appear, however, to have been for temporary purposes, and never to have superseded the old extent of King Alexander, which, even after the passing of the statute of 1474, (below, Art. 3.) continued to be the rule for imposing public subsidies. All our authors agree that the old extent expressed in retours was according to the valuation of that Prince. During the Usurpation commissioners were appointed to make a new valuation of every county in Scotland, a measure which was sanctioned, after the Restoration, by the Act of Convention of 1667; and the old extent was at length superseded by the rate fixed by the commissioners, which has continued under the denomination of the valued rent to be the rule for levying the land-tax and certain other public burdens; (below, Art. 4.) It has long been superfluous to insert the old extent in retours, although, until the abolition of freehold votes, it was still convenient to introduce it where it exceeded 40s. Scots.

3. *New extent.*—The rate properly so called was introduced by the statute of 1474 (*i*), which enacts, that it be answered in the retour "what the land was of availe of the "auld, and the very availe that it was worth and gives the "day of serving the brieve." From these expressions it may be inferred that the practice which has been alluded to, of inserting a new extent in the retour, whether ascertained by a general valuation, or by the inquest in each particular service, had not been general, and that superiors were thus defrauded of their just casualties of non-entry and relief. But this act, although at first partially obeyed, soon lost its effect; for it

appears, that after lands had been once valued by an inquest, the extent thus ascertained was ever after inserted in the retours as the new extent; and that, where the provisions of the enactment had been neglected, the new extent came usually to be fixed at the quadruple of the old (*k*). It is still necessary to insert the new extent in retours, as being the rule for imposing the non-entry and relief duties payable to the superior; (below, § 363-4.) In feu-holdings, the feu-duty is the presumed annual value, and is therefore the new extent.

4. *Valued rent.*—The fixed rate appointed under the authority of Cromwell, and sanctioned by the Convention Parliament, is called the valued rent. It is the statutory rule for calculating the non-entry duties in lands formerly held ward, now blench, of the Crown, and is therefore inserted in the retours of special services to such lands (*l*).

5. *Proof.*—The old and new extent are instructed to the inquest by a former retour, the valued rent by the certificate of two commissioners and the clerk of supply of the county where the lands lie. In the absence of a retour, the extents are estimated by the proportion which the valued rent bears to the valued rent of other lands, situated within or adjacent to the shire where the lands are situated, of which the old and new extents are known, agreeably to a rule established by the Court of Exchequer (*m*). A calculation by an accountant on these data is in practice received by the Court of Inquest, as evidence sufficient to sanction the insertion in the retour of the sums reported on as the old and new extents of the lands (*n*). But the old extent may now be omitted as superfluous.

(*a*) *Fourth head of brieve.*—Et quantum valent dict. terræ et annui redit. cum pertinen. nunc per annum et quantum valuerunt tempore pacis.

Fourth head of claim.—And that the said lands and others above described are now worth yearly the sum of (*new extent*) and were worth the sum of (*old extent*) money foresaid in time of peace.

(*b*) Craig, 2. 17. 35-6.

(*c*) Stair, 3. 5. 38.

(*d*) Kames' Law Tracts, *Old and New Extent;* Ersk. 2. 5. 31-4.

(*e*) See extract in Advocates' Library.

(*f*) Ersk. 2. 5. 32.

(*g*) Black Acts, c. 10-11.

(*h*) Ersk. as in (*f*).

(*i*) 1474, c. 55.
(*k*) Skene, *v. Extent.*
(*l*) 20 Geo. II. c. 50.
(*m*) 17th Feb. 1731.
(*n*) Jurid. Styles, 1. 384.

345. FIFTH HEAD (*a*).—The person of whom the lands are held as superior is shown by a former charter or retour.

(*a*) *Fifth head of brieve.*—De quo tenentur. *Fifth head of claim.*—And that the said lands and others are holden immediately of her Majesty and her royal successors *(or other superior.)*

346. SIXTH HEAD (*a*).—Under this head, the *tenure* and *reddendo*, which regulate the casualties of superiority, are proved by the same evidence as the fifth head.

(*a*) *Sixth head of brieve.*—Per quod servitium tenentur. *Sixth head of claim.*—In *(feu or blench)* farm fee and heritage for payment of *(duty filled up from the reddendo of last charter or retour.)*

347. SEVENTH HEAD (*a*).—This, the last head of the claim and brieve, relates to the period which has elapsed since the ancestor's death, as regulating the casualty of non-entry. If the lands are in the possession of a tercer or other liferenter, the casualty is excluded; (below, § 363); and such possession is stated in the retour. But the heir is nevertheless entitled to be served, and to be infeft in the fee.

(*a*) *Seventh head of brieve.*—Et in cujus manibus nunc sunt. *Seventh head of claim.*—And that the said whole lands and others above described are now and have been in the hands of her Majesty immediate lawful superior thereof *(or other superior)* by reason of non-entry since the death of the said B. my father which happened upon the day of and so have remained in the hands of her Majesty for the space of years months or thereby through my not having prosecuted my just right thereto as nearest and lawful heir therein of the said B. my father. Therefore &c.

348. OBJECTIONS ON THE MERITS.—1. *Parties who may appear.*—(1.) An opposing party having an interest may, according to the authorities, meet the claimant upon certain points of inquiry. But it is difficult to perceive how any interest that is not sufficient entirely to exclude the claim, (above, § 339,) could be instructed under the summary forms

of a service, except by one holding a feudal right to the disputed subject, or acting on behalf of an heir *in utero*. A party founding upon a disposition by the ancestor, on which infeftment has not followed, has no title to stop the service; (above, § 339); but although his interest does not extend so far, it would seem that he will be permitted to cross-examine the claimant's witnesses (*a*). (2.) In practice, accordingly, it is found, that to oppose a service effectually, the competing party must likewise purchase a brieve. By the former rule, both claimants might contend before the same inquest in the court of the Sheriff; but the modern form is to bring up the brieve by advocation before one of the Lords Ordinary of the Court of Session, and the service proceeds according to the rules of evidence (*b*). (3.) Where, however, a question of law takes precedence of that of fact, *e.g.* if two claimants maintain the rights of two separate branches of a destination, the Court will in the first instance discuss and determine the point of law (*c*).

2. *Illegitimacy.*—Illegitimacy as an objection on the merits available to one having a competing brieve, is manifestly pleadable only against the opposing party, or any of the intervenient blood through whom he deduces his right; and not against the ancestor to whom the service is craved. Illegitimacy must be specially proponed, and in the general case the *onus probandi* lies on the competitor (*d*).

3. *Heir in utero.*—(1.) It is a good objection to service claimed by a collateral heir, that the deceased has left a widow suspected to be with child, so long as there are hopes of her delivery (*e*). (2.) But there are two situations in which the plea that a nearer heir may exist is not relevant to stop the service. Where an only child predeceases his father without issue, the father may be immediately served as his undoubted heir, although, so long as the father lives, it is possible that his own right may be defeated by his having another child born to him (*f*). Again, where an heir of entail is substituted to the heir of a particular marriage, and no child has yet been born of the marriage, the substitute heir is allowed to serve and enter into possession in the meantime, under an implied obligation to denude in favour of the nearer heir, on his

coming into existence (*g*). The heir so serving, who is called heir-expectant, may exercise the rights of a fiar, (in so far as the fee is not limited,) to the extent at least of selling for payment of family debts without judicial authority, and securing his wife in a liferent provision by infeftment (*h*).

(*a*) Sandford on Succession, 1. 284. See Forbes, 3d July 1810, F. C.; Cochrane, 28th June 1821, F. C., 1 S. 91.

(*b*) 1 and 2 Geo. IV. c. 38; 1 and 2 Victoria, c. 86, § 2. *Note.*—In reductions of services the evidence is taken on commission. Jury trial is held inapplicable to the circumstances, as the result depends upon the evidence taken upon the service, as well as on the new facts and documents adduced in the reduction. Anderson, 18th June 1834, S.; Officers of State, 4th July 1835, F. C., 13 S. 1044.

(*c*) Don, 28th Nov. 1712, M. 14,425; Innes, 23d June 1807, M. App. *v. Tailzie*, No. 13.

(*d*) Ersk. 3. 8. 66; Stair, 3. 5. 35; Corsbie, 15th Jan. 1629, M. 2747. See D. of Roxburghe, 24th May 1822, S. Ap. 1. 157; Lindsay, 6th April 1824, S. Ap. 1. 147.

(*e*) Ersk. 3. 8. 76; Stair, 3. 5. 50.

(*f*) Watt, 15th Jan. 1706, M. 14,901.

(*g*) Stair, Ersk. as in (*e*); Mountstewart, 2d Jan. 1708, and 13th Dec. 1709, M. 14,903-12; Mackinnon, 16th June 1756, M. 5279-90, 6566; B. S. 5. 873, 889, 904; affirmed on ap. See Bruce, 22d Feb., 24th July 1677, M. 14,880; Middlemore, 5th March 1811, F. C.

(*h*) Mackinnon, as above.

349. VERDICT (*a*).—The verdict of the jury is, in general terms, affirmative of the claim. It is stated by our institutional writers that the jury do not negative any of the heads of the claim in regard to which the proof is defective; but, in practice, a special verdict, omitting an answer to certain heads of the claim, is unknown. If the necessary evidence cannot be adduced, the service will, as a matter of course, be adjourned. The verdict of the jury is the authority under which the clerk of Court frames and authenticates the retour of the service.

(*a*) Jurid. Styles, 1. 386-7.

350. RETOUR (*a*).—1. *Form and authentication.*—(1.) In the retour of the special service, the heads of the brieve are answered *seriatim*, in the affirmative. It bears to be authenticated by the seals of the major part of the inquest, and of

the sheriff-clerk as clerk to the service; but in practice, it is authenticated by the mere subscription of the clerk. (2.) The retour is lodged in the office of the Director of Chancery, accompanied with the brieve and its executions; and by statute (*b*), the claim of service, the verdict of the jury, the depositions of the witnesses, and the minutes of procedure, are directed to be sent to Chancery. An extract, or *vera copia* as it is titled, of the retour, is furnished to the heir if demanded; but such copy is not a necessary part of his title.

2. *Effect of retour of special service.*—(1.) Service in special duly retoured to Chancery vests nothing in the heir. Its effect expires if he should die before infeftment. (2.) But as a special includes a general service *ejusdem generis*, it will necessarily vest in the heir all personal rights, and those *quasi feuda* which are transmissible by general service in the character set forth in the brieve, claim and retour (*c*). This effect of a general service is relied on in practice; and it seems to follow, that if the right is once vested, it cannot be afterwards evacuated by the delay or neglect of the heir to follow up the service as a proper special service; otherwise it must result, that infeftment on a conveyance carried by the implied general service would be a defeasible title (*d*). (3.) Special service is a title of prescription of the right of succession, and bars all challenge of the propinquity of the heir after twenty years (*e*).

(*a*) Jurid. Styles, 1. 387-8.

(*b*) 1 and 2 Geo. IV. c. 38, § 12.

(*c*) See Cochrane, 11th March 1828, F. C., and 6 S. 751; reversed, 4 W. S. 138.

(*d*) See More's Notes on Stair, p. cccxxvi; Bell's Princ. 1847.

(*e*) 1617, c. 13. See Neilson, 17th Jan. 1837, F. C., 15 D. 365.

351. LANDS IN MORE THAN ONE SHERIFFDOM.—By the former practice, when the lands lay in different shires, or the Sheriff of the shire in which they were situated was himself the claimant or within the forbidden degrees of relationship to the heir, it was competent to apply to the Court for a warrant to the Director of Chancery to issue a commission to the macers of court to sit as judges in the service (*a*). The macers had jurisdiction also in advocations of brieves from the Judges Ordinary, but in cases of difficulty they were as-

sisted by two of the Judges of the Court as assessors. The powers of the macers have recently been taken away, and the Sheriff of Edinburgh is substituted in their room in services on commission, and the Lords Ordinary in advocations (*b*).

(*a*) *Note.*—Dallas (p. 887,) mentions an instance of a commission under the Quarter Seal to a nobleman as *Sheriff in that part*, granted on the Lords' deliverance, to serve the heir as being himself heritable Sheriff of the shire where the lands were situated.

(*b*) 1 and 2 Geo. IV. c. 38; 1 and 2 Vict. c. 86, § 2.

352. COURT OF THE SHERIFF OF EDINBURGH.—The forms in services before the Sheriff of Edinburgh, as coming in place of the macers of the Court of Session, are fully detailed in the Style-book (*a*). The heir obtains, in the Bill-Chamber of the Court of Session, a warrant for a commission to the Sheriff, which is issued by the Director of Chancery, and brieves, one or more, according as the lands lie in a single county or in several counties, are addressed to him as *Sheriff in that part*, or Sheriff by special commission of all the sheriffdoms in which any parts of the lands are situated, *pro hac vice*. These brieves are executed by the officers of the respective shires. The service proceeds in the court-room of one or other of the Divisions of the Court, the clerk of Court being a writer to the signet (*b*). The Court has the power of discretionary adjournment (*c*). The forms of the service are substantially the same as in ordinary cases before the Judge Ordinary of the shire. Services before the Sheriff of Edinburgh on commission, may, like other services, be advocated so as to proceed before one of the Lords Ordinary of the Court of Session (*d*).

(*a*) Jurid. Styles, 1. 404, *et seq.*
(*b*) Act of Regulat. 30th Aug. 1672, c. 16, § 33; 1 and 2 Geo. IV c. 38.
(*c*) Jurid. Styles, 1. 411.
(*d*) 1 and 2 Geo. IV. c. 38; 1 and 2 Vict. c. 86, § 2.

TITLE V. FORMS IN THE GENERAL SERVICE.

353. BRIEVE.—Service of an heir in general to a particular ancestor proceeds, as above stated, on a brieve in the

same form as the brieve in a special service. The immediate purpose of the general service is to establish a particular character and relationship in a certain degree, without reference to lands or subjects, and the brieve may, at the pleasure of the claimant, be directed to the Sheriff of any shire, or the Magistrates of any burgh royal, or any burgh of regality having a court of record.

354. CLAIM.—(1.) The first three heads only of the brieve are set forth in the claim in a general service. These are, *first*, that the ancestor died at the faith and peace of the Queen; *secondly*, that the claimant is his nearest and lawful heir; and, *thirdly*, that the claimant is of lawful age. The second head, therefore, contains the only point of inquiry; (above, § 341.) The claim must correctly set forth the propinquity of the claimant, and the precise character in which he presents himself to the inquest. (2.) Thus, a service as heir of line will not in the general case carry a subject destined to heirs of provision (*a*); nor a service as heir-male determine that the claimant is heir of a particular marriage, although it should happen that both characters meet in his person (*b*); and the rule applies to the service of one as heir of line, who is likewise heir-male (*c*). Thus, also, a service as heir-male and of line will not connect the heir so serving with a deed executed by the ancestor to whom the service has been expede, under which he is heir of provision *nominatim*, although the heir may happen to be truly the heir of provision (*d*). In these instances, either the characters are not necessarily identical, or there is an absence of specialties sufficient to infer the necessary connection of the heir with the right to be taken up by the service. (3.) But where the character in which an heir claims necessarily includes that particular description of heir to which the right belongs, *e. g.* where an eldest son claims as heir of line to his father, or an heir-male as nearest heir-male of tailzie and provision, his service as such implies that he is likewise heir-male, and therefore carries rights destined to heirs-male (*e*). Thus also, if a party serving as heir of provision specially describes a subject to which he has right, not as such but as heir of

line, and condescends on the deed by which the right is constituted, the character in which he is served does not vitiate the retour, as he is thus connected by name both with the deed and the subject under and to which a title is to be completed (*f*). A general service of this specific description is analogous in form to a special service, in which it is thought that a less critical interpretation would be given to the specification of the heir's character; (above, § 342.)

(*a*) Cairns, 12th Nov. 1742, M. 14,438.

(*b*) Edgar, 21st July 1738, M. 14,015; Elch. *Serv. of Heirs*, No. 2; Couterallers, 2d Feb. 1742, 7 B. S. 5. 717.

(*c*) See Bell, 21st June 1749, M. 14,016-19.

(*d*) Cathcart, 16th Nov. 1802, M. 14,447; as altered on remit, 24th Nov. 1807, M. App. *v. Serv. of Heirs*, No. 2; affirmed, 31st May 1825, W. S. 1. 239.

(*e*) Livingston, 13th Dec. 1705, M. 14,004; Haldane, 27th Nov. 1766, M. 14,443. See E. of Dalhousie, 13th Nov. 1712, M. 14,014; Anderson, 22d June 1832, F. C., 10 S. 696.

(*f*) Bell, as in (*c*).

355. PROCEDURE.—To the extent of the inquiry the procedure in a general is similar to that in a special service. The evidence of the propinquity, which is frequently remote, cannot in all cases be rested on hearsay or common fame. It often becomes necessary to found upon and produce ancient retours, charters, sasines, extracts from parish registers, family bibles, and other documentary evidence, in order to make out even a *prima facie* case. Where claimants are in competition the proof must of necessity be carefully prepared and adduced (*a*).

(*a*) Stair, 3. 5. 35.

356. OBJECTIONS.—1. *Preliminary.*—The objections of a preliminary or exclusive character seem to resolve into these: *first*, That the brieve or executions are informal; (see above, § 339. 2.); *secondly*, That the opposing party has already expede a general service in the character expressed in the brieve; or even a special service in the same character, since a special includes a general service *ejusdem generis* (*a*); and, *thirdly*, that the ancestor was illegitimate, and that the opposing party has obtained a gift of *ultimus hæres* from the Crown. But these objections must be instantly verified (*b*).

2. *On the merits.*—Without a competing brieve in the same character as that maintained by the claimant (*c*), an opposing party has no title to go to proof in a general service, unless, perhaps, in behalf of an heir *in utero;* but this exception may appear to be preliminary. In a special service, the rule is necessarily different in a limited number of cases. A party, for example, infeft on a precept of *clare constat* by the superior has thus a feudal title to the lands, which, although not sufficient to exclude special service by another, as being granted without the legal warrant and authority of a retour, seems a good title to oppose the claimant on the merits without a competing brieve; (above, § 348.)

(*a*) See Cochrane, 11th March 1828, F. C., 6 S. 751; reversed, 29th April 1830, 4 W. S. 138.

(*b*) 1503, c. 94, p. 457.

(*c*) Forbes, 3d July 1810, F. C.; Cochrane, 28th June 1821, F. C., 1 S. 91; Aitchison, 7th March 1829, 7 S. 558.

357. RETOUR.—(1.) The general service, when retoured to Chancery, gives an active title to pursue actions concerning the heritable subjects which belonged to the ancestor, and enables the heir to execute the feudal clauses of deeds the right to which was vested in him. Services prior to the year 1550, at which period our records were destroyed by the English, as well as those which proceeded on brieves issued in the ancient jurisdictions of regality, are valid, although the retours do not appear on record (*a*). An extract or true copy of the retour may be obtained at any time from Chancery. (2.) General service, duly retoured, is a title to exclude all question as to the propinquity of the heir after twenty years (*b*).

(*a*) Macintosh, 2d Feb. 1698, M. 14,431.

(*b*) 1617, c. 13; Neilson, 17th Jan. 1837, F. C., 15 D. 365.

TITLE VI. SERVICE OF HEIRS OF TAILZIE.

358. SERVICE IN GENERAL.—An heir of tailzie expeding a general service under the deed of entail does not incur an irritancy by the omission of the conditions, prohibitions, or

irritant and resolutive clauses in the retour; (above, § 281.) There is thus nothing peculiar in the procedure. The deed will be properly identified by date, and the date of its registration, and the character of the claimant as heir of tailzie and provision duly set forth. The correct identification of the deed is peculiarly necessary where the claimant has right under more than one tailzie (*a*).

(*a*) Forbes, 12th Aug. 1753, M. 14,431.

359. SERVICE IN SPECIAL.—The service of an heir of entail in special may take place either upon the death or the contravention of a former substitute.

1. *To the institute, or a substitute deceased.*—The service proceeds on a brieve obtained by the heir in the express character of heir of tailzie and provision. The claim will contain, under the first head, not only the lands but the destination, in so far as not already exhausted, and the whole conditions, provisions, prohibitions, and irritant and resolutive clauses of the entail (*a*). The prayer will be to serve the claimant as nearest and lawful heir of tailzie and provision to the member last vested and seised in the lands as of fee, but always with and under the conditions, &c. of the deed. The propinquity, in so far as it rests on the evidence of relationship, is proved as in the ordinary case, (above, § 342,) and the titles of the last possessor connect that evidence with the destination.

2. *On declarator of contravention.*—Service to a remoter ancestor, on the contravention of the heir last in possession, proceeds in a similar form; but there is added to the first head of the claim a statement of the title of the contravener, and of the decree of declarator by which the forfeiture is instructed. The term during which the lands have been in non-entry commences at the date of that decree (*b*).

(*a*) Jurid. Styles, 1. 396-7.
(*b*) Jurid. Styles, 1. 399.

TITLE VII. SERVICE CUM BENEFICIO INVENTARII.

360. PURPOSE.—This form of service has no peculiar feudal effect, being employed for the purpose of restricting the liability of the heir to the value of the subjects specified in the inventory (*a*), and his title is unqualified. Reference is made to the Style-book (*b*).

(*a*) 1695, c. 24.
(*b*) Jurid. Styles, 1. 401.

TITLE VIII. CROWN PRECEPT.

361. PURPOSE.—In Crown-holdings, the next step in the entry of an heir whose ancestor died vested and seised as of fee, is the precept issued from Chancery for the heir's infeftment, proceeding on the narrative of the retour of his special service. As regards the heir it is a mere warrant for infeftment (*a*). It is directed to the Sheriff of the shire where the lands lie, and is executed by him as bailie of the Sovereign, and by the sheriff-clerk as notary. The Sheriff is farther commanded to take security from the heir for the non-entry and relief duties payable in respect of his entry, which are calculated to the term of Whitsunday or Martinmas preceding the service. The effect of the precept is limited to the term following its date by the words, "*præsentibus post proxi-*" *mum terminum minime valituris* (*b*)." This leads us to consider the origin and nature of these duties.

(*a*) Jurid. Styles, 1. 389.

(*b*) *Note.*—Sir Thomas Hope (Min. Pr. *v. Ward, Non-entry, &c.* § 16, 17,) thus describes the duty imposed on the Sheriff: "*Item*, The Director of the "Chancery upon the service being retoured directs precepts inclosed in white wax "as the brieves are to the Sheriff of the shire where the lands lie which precepts "bear a command to the Sheriff to give sasine of the lands to the person who is "served and retoured heir to his predecessors but with this clause "*capiendo* "*securitatem pro decem aut viginti libris, &c.*" or so much more as the retoured "duty comes to yearly, for so many years as the lands by retour are found to be "in non-entry and also for a year's duty of the new extent or retoured mails *pro* "*relevio* if they be ward-lands; and if they be blench for duplication of the blench-

" duty; and if they be feu for duplication of the feu-duty; and at the delivery " of this precept of sasine by the director to the party, there is insert by the " director in his book called *The Book of Responde* a note of the sums for which " the Sheriff shall take security in this form, *Respondebit vicecomes pro summa— " ratione sasinæ &c. Dandæ tali &c. de terris &c.*" And according to this *Re- " sponde* the Sheriff is charged yearly to make compt to the Exchequer, which " holds yearly in July. Conform to this precept the Sheriff, when the same " is presented to him, takes good security for payment of the money contained in " the precept, and thereafter gives sasine, and for giving thereof takes a sasine- " ox. And although the precept be not presented to the Sheriff, nor sasine " taken thereof, yet the Sheriff, by custom of the Exchequer, is still charged " with the *Respond*, and compelled to pay the same, whereof there is no pro- " bable cause but this, that it is presumed that the party raiser of the precept " will not neglect to take sasine on the precept, especially seeing it bears this " clause, *Presentibus post proximum terminum minime valituris.*"

362. NON-ENTRY.—1. *Introductory remarks.*—Lands fall in non-entry by the death of the vassal last vested and seised as of fee, and the fee continues void until the entry of an heir or disponee by infeftment on the superior's charter or precept, or his confirmation of an infeftment on an indefinite precept, or a precept *a me*. In the early ages of the feudal system the lands reverted to the superior on the vassal's death. Even after fees had become hereditary, the investiture behoved to be renewed upon every change either of the vassal or the superior, and the neglect of the vassal or his heir for a year and a day to apply for new infeftment, inferred by the feudal usages the forfeiture of the fee (*a*). But by our customs, it is on the death of the vassal only that the infeftment falls, and the penalty of forfeiture has never obtained by force of law, through the mere neglect of the heir to demand an entry. The superior, it is true, might of old have resumed possession of the lands in virtue of his radical right; but the vassal's heir had still the remedy of a service to ascertain his propinquity, and ground a demand to be received by the superior (*b*). Whilst military service prevailed, the heir was excluded from the possession of the fee during his minority, when he was presumed unable to serve his superior in war; and in Scotland, the right of the superior to that possession was the most valuable casualty of a ward fee. The casualty received the name of *ward*, as the distinguish-

ing mark of that particular holding; and when it subsisted, the fee was *necessarily* void until the heir's majority. Non-entry applied more immediately to the situation of the fee in other tenures after the ancestor's death, and before the heir demanded an entry, during which period it was *voluntarily* void (*c*). But the fee was not forfeited to the superior until the contumacy of the heir had been ascertained in a process of declarator, and the right adjudged to be permanently lost.

2. *Non-entry, how caused.*—(1.) Anciently, lands fell in non-entry not only upon the death, but by the resignation of the vassal, and the fee remained void until the new infeftment of the heir or resignatary. In the case of death the rule still holds, and the fee becomes again full only by the duly completed investiture of the heir, or in other words, by the registration of a sasine upon the precept of the superior within the statutory period. But by our modern practice, resignation does not vacate the fee, since the resigner is not thereby divested; (above, § 154.) (2.) A conveyance to a purchaser or other disponee, although followed by infeftment duly completed, does not divest the disponer, or place the lands in non-entry during his life, provided such infeftment proceeds upon a precept *a me*, or an indefinite precept (*d*). Sasine upon the former does not divest the disponer until confirmed, when, by the act of confirmation, the disponee is invested. Sasine, again, on the indefinite precept, has, until confirmation, the effect only of creating a holding base of the disponer himself, and does not touch the fee in his person. A disponee, therefore, cannot be compelled to take an entry from the superior until after the death of the disponer, or the person last vested and seised in the fee; (above, § 148. 4.)

3. *How excluded.*—Non-entry is, in certain cases, excluded even after the death of the fiar. The principle on which exclusion operates seems to be the consent, express or implied, of the superior to an infeftment which carries the yearly fruits of the fee. (1.) It is excluded by an infeftment in conjunct fee and liferent given by a husband to his wife; by the reserved liferent of one who grants a conveyance of the fee under such reservation, by the legal liferents of the

courtesy, and, so far as it extends, of the terce; and by any other liferent confirmed by the superior (*e*). (2.) It is excluded (or rather the casualty is restricted) by a sub-feu confirmed by the superior (*f*); but in Stair's opinion, such confirmation imported only a passing from recognition (*g*).

(*a*) L. 2, Feud. Tit. 24, Pr.
(*b*) Rob. III. c. 19 and 38; Stair, 2. 4. 18; Erak. 2. 5. 29.
(*c*) Hope, Min. Pr. *v. Ward, Non-entry*, &c. § 5; Stair, as in (*b*).
(*d*) Erak. 2. 5. 44.
(*e*) Stair, 4. 8. 7; 2. 4. 23; Erak. 2. 5. 44; Bryce, 10th Jan. 1566, M. 9333.
(*f*) Bankton, 2. 4. 25; Erak. as in (*e*).
(*g*) Stair, 2. 4. 23.

363. NON-ENTRY DUTIES.—1. *Effect of non-entry.*—(1.) As the right of the vassal's heir or disponee to a renewal of the investiture is not cut off by mere delay to apply for an entry, he is allowed, in the meantime, to possess the subject, although, in technical language, the fee is said to be void and fallen to the superior by reason of non-entry. But in theory the superior has a right to the maills and duties of the lands from the day of the vassal's death, notwithstanding the possession of the heir or disponee. These duties were intended to be fairly ascertained, by means of the brieve of inquest, under the name of the new extent, (above, § 344. 3.) which is the standard by which the non-entry duties before citation are still levied, and for their recovery the superior has the most effectual remedy consistent with the possession of another, viz. poinding of the ground. (2.) But after citation in the action for having the fee declared to be forfeited by reason of non-entry and the contumacy of the heir or disponee, the superior is held to have the right of possession, and consequently to levy the rents payable to the actual possessor; and decree in the declarator, whether to the effect of absolute forfeiture, or for payment of the rents until the entry shall be completed, accordingly carries back the right of possession to the date of citation (*a*).

2. *Before citation.*—(1.) The superior, before citation of the heir, is entitled, in original blench-holdings, to the retoured duties called the new extent; (above, 344. 3.); and in

the absence of a retour, the new extent is ascertained in the manner before stated. (2.) In those Crown-holdings which were by statute (*b*) changed from ward to blench, the non-entry duties before citation are thereby fixed at one *per cent.* of the valued rent, according to which the land-tax is assessed; and the act directs that all special retours of such lands shall set forth not only their old and new extent, but likewise their valued rent. (3.) In feu-holdings they are the yearly feu-duties, without regard to the amount (*c*); so that, in the tenure of feu, the casualty of non-entry is of no value to the superior prior to citation in the declarator. (4.) In annualrent rights, the annualrent was, by our old practice, retoured *valere seipsum*, and the creditor's heir, while he continued in non-entry, was liable in the full annualrent or interest. But this could only happen where the creditor's infeftment had been confirmed by the debtor's superior; (above, § 199.) It was provided, however, by a statute passed in 1690 (*d*), that annualrent-rights should be retoured to the blench or other duty contained in the infeftments, and the superior is thus entitled to a mere elusory duty before citation. (5.) In teinds, as in lands, the holding regulates the non-entry duties. When feu, the feu-duty only is exigible before citation; when blench, a fifth of the new extent.

3. *Non-entry duties after citation.*—These are in strict law the free rents of the lands, whatever the holding; the full teind-duty; and the interest of the annualrent right. But the Court exercise an equitable interference when the delay to take an entry has been excusable, and usually subject the heir in the full rents from the date of the decree only (*e*).

4. *Claim, how barred.*—(1.) A superior is barred, *personali exceptione*, from demanding non-entry duties, after a charge given by the vassal to give him entry in the fee, accompanied by an offer of the non-entry and relief duties so far as due (*f*). (2.) A charge by an adjudger, with an offer of the statutory composition and the non-entry duties, has a similar effect (*g*). (3.) A superior uninfeft, who delays to complete his own title after a charge by the vassal, forfeits the non-entry duties during the vassal's life (*h*). (4.) The delay of the heir of the superior to complete his title, or any other circum-

stance arising out of the state of the superior's affairs, which transfers the charge of *mora* from the vassal to the superior or his heir, excludes a claim for non-entry duties (*i*).

5. *Presumed discharge of duties.* — Non-entry duties already exigible are presumed to have fallen or been discharged, *first*, by infeftment in the fee for forty years after they fell due; *secondly*, by infeftments on precepts by the superior in favour of three consecutive heirs; *thirdly*, by a charter of *novodamus*, or (in so far as regards the period preceding the ancestor's death) by a precept of *clare constat* voluntarily granted by the superior (*k*).

(*a*) Stair, 2. 4. 21-2.
(*b*) 20 Geo. II. c. 50.
(*c*) Ersk. 2. 5. 36; Jurid. Styles, 1. 454.
(*d*) 1690, c. 42, above, p. 267.
(*e*) Ersk. 2. 5. 40; Copland, 26th July 1771, B. S. 5. 610; Coltart, 15th Feb. 1782, M. 9313; Robin, 13th June 1823, F. C., 2 S. 404; Hill, 10th July 1833 and 7th Feb. 1834, F. C., 12 S. 411.
(*f*) Ersk. 2. 5. 45.
(*g*) Ersk. last ref.; Univ. of Glasgow, 24th July 1713, M. 9296.
(*h*) 1474, c. 57, above, p. 230.
(*i*) Ersk. 2. 5. 40-45.
(*k*) Craig, 2. 19. 16-17; Stair, 2. 4. 23; Ersk. 2. 5. 46.

364. RELIEF.—(1.) *Introductory remarks.*—The casualty of relief is of uncertain origin, and in the modern holding of feu-farm, its existence, independently of paction, must be considered as doubtful. Craig, on the authority of Cujacius, who again refers to a constitution of the Emperor Leo, ascribes the origin of the casualty of relief to the custom in certain countries of paying a year's rent, or a fixed sum, for the renewal of the fee (*a*). The 13th constitution of Leo relates, however, only to certain exactions of the prefects from consecrated houses, (churches, hospitals and houses set apart for the maintenance of widows and children,) on the occasion of renewing the possession at the termination of their leases, (*quando locationis terminus ac possessionis renovatio instat,*) and it limits the demand to a duplicand of the yearly duty (*b*). But whatever may have been the origin of the payment, it appears to have been in Scotland a fixed duty in ward-holdings only. It is expressly stated by Craig, in reference to feu-farm, that by the

prevailing notion, relief was not exigible in that holding, unless expressed in the charter, *plerique non deberi putant nisi id, ex pacto, in instrumento feudi expresse contineatur.* But it is true, that in the following section he in some measure qualifies this statement, by ascribing the common opinion that relief was confined to ward-holding, to its trifling amount in blench-holding, and in feu-holding to the circumstance that it appeared to be matter of ordinary paction (*c*). Sir Thomas Hope derives the origin of the term in ward-holding, from the nature of the payment by the vassal's heir, as being "a relief "for relieving him out of his ward;" and he ascribes the payment of a duplication of the duty in blench-holdings to an imitation of this relief in ward. "And as to feu-lands, (he "says,) the clause of the charter commonly bears *duplicando* "*feudifirmam primo anno introitus cujuslibet hæredis;* and if "the charter bear it not, yet the custom of the Chancery is "not to give out a precept upon a retour but with this clause, "*capiendo securitatem pro duplicatione feudifirmæ* (*d*). According to Hope's opinion, therefore, the casualty of relief in feus held of the Crown, when not conditioned in the charter, depended on the practice of Chancery. Mackenzie observes generally, that in blench and feu holdings, the relief is the double of the duty (*e*); and Lord Stair remarks, that it is due without paction in feu-holdings, founding his opinion, however, on the undecided views of Craig and Hope (*f*). But the authority of Mr Erskine, which is entitled to the greatest weight, as formed upon a review of the opinions of the earlier writers, is expressly in favour of the right of the superior to the relief in feu-holdings, without a special provision in the charter (*g*). At the same time it must be observed, that he rejects the authority of two decisions to the effect that the heir of a feuar cannot be required to double his feu-maill or feu-farm at his entry to the lands, if he be not bound to that condition by the terms of his infeftment (*h*). And thus, although in practice the opinion of Mr Erskine seems to have been adopted, the question may yet perhaps be considered open.

2. *How estimated.*—Relief in Crown-holdings, whether

blench or feu, is uniformly ten merks Scots (*i*). When the superior is a subject, it is a duplicand of the feu or blench duty. In regard to the relief formerly due in ward-holdings, reference is made to our systematic writers (*k*).

(*a*) Craig, 2. 20. 30-3.
(*b*) Imp. Leonis Constit. xiii.
(*c*) Craig, 2. 20. 32-3.
(*d*) Hope, Min. Pr. *v. Ward, Non-entry,* &c. § 12.
(*e*) Mack. 2. 5. 22.
(*f*) Stair, 2. 4. 27.
(*g*) Ersk. 2. 5. 48.
(*h*) Kincaid, 1st Dec. 1610, M. 13,579; E. of Dundonald, 24th Nov. 1746, noticed in report of Kincaid.
(*i*) Jurid. Styles, 1. 455.
(*k*) Craig, 2. 20-33; Stair, 2. 4. 27; Ersk. 2. 5. 49.

365. INSTRUMENT OF SASINE (*a*).—(1.) The sasine upon the Crown precept is, like its warrant, in the Latin language. It is authenticated by the sheriff-clerk of the county where the lands lie, and it must bear that sasine has been given by the Sheriff or his substitute as the bailie of the Sovereign; (above, § 62. 3.) (2.) If the Sheriff should refuse to give sasine, or be the party to receive infeftment, a warrant will be obtained from the Court to the Director of Chancery to issue a precept directed to another, as *Sheriff in that part* (*b*). (3.) Infeftment must be given on the Crown precept on or before the next term of Whitsunday or Martinmas following its date, after which, by the operation of a clause above noticed, (§ 361,) the precept ceases to have force. The effect will be the same of delaying to record a sasine taken upon the precept within the statutory period of sixty days; the term-day being past, infeftment cannot be given of new. But another precept may be obtained in which the non-entry and relief duties, calculated of new, will be inserted, as they amounted at the term of Whitsunday or Martinmas preceding the date of the precept (*c*).

(*a*) Jurid. Styles, 1. 390.
(*b*) Dallas, p. 883; Jurid. Styles, 1. 392; A. S. 15th Feb. 1678.
(*c*) Jurid. Styles, last ref.

TITLE IX. PRECEPT OF CLARE CONSTAT.

366. VOLUNTARY, OR ON CHARGE.—(1.) The entry by precept existed prior to the introduction of the service as a means of ascertaining the heir's propinquity; (above, § 331. 1.) After the retour of service was recognised as a warrant for enforcing an entry, the precept for the heir's infeftment, when still granted voluntarily, assumed the name of precept of *clare constat*, as granted on the private knowledge of the superior, the precept upon a retour being styled precept of sasine (*a*). In our present practice the writ is called precept of *clare constat* indifferently, whether granted on the private information of the superior, or on the evidence of a retour. (2.) The forms introduced for compelling superiors to enter the heirs of their vassals were fortified by the sanction of the loss or tinsel of the right of superiority during the lifetime of the heir. These forms are minutely described by Hope and Dallas (*b*). They have given place to the statutory remedy of letters of horning passed in virtue of the retour of the heir's special service upon which the immediate superior is charged, upon an *inducie* of fifteen days, to grant precepts to the heir; and if obedience is withheld, the heir may charge the mediate superiors in their order upwards to the Sovereign, who refuses none (*c*). When the superior has a claim against the vassal or his heir, which would be affected by obeying the charge, he may have the question determined in the form of suspension; but it is not a ground for a stay of diligence, that the superior has already granted a voluntary precept to another; (below, § 368. 5.) The obligation of the superior to give infeftment to the heir is conditional on his receiving the non-entry and relief duties, exigible from the heir. (3.) When the right of superiority is vested in two parties in fee and liferent, both the fiar and liferenter must be charged, and ought to join in granting the precept. But liferenters by reservation may enter vassals without the concurrence of the fiar. This privilege, which attaches to the original infeftment of the liferenter, has never been doubted to the extent of entering heirs (*d*);

and Craig carries it the length of receiving singular successors on resignation, a view which seems to be confirmed by statute (*e*), and necessarily embraces entry by confirmation. The right of the liferenter by reservation to enter heirs and disponees implies a title to receive the casualties of superiority falling during his lifetime (*f*). (4.) The eldest of heirs-portioners has the sole right of entering vassals, but the concurrence of the co-heirs will not injure the precept. (5.) The Court have the inherent power of authorising the entry of vassals, in subjects sequestrated under their authority; and when the circumstances render such authority necessary, they authorise their factors to grant charters, precepts of *clare constat* and all other writs and deeds requisite in entering and receiving vassals, on payment of the feu-duties and usual casualties of superiority (*g*).

(*a*) Hope's Min. Pr. *v. Ward, Non-entry, &c.* § 21, 24; Dallas, 819.
(*b*) Hope's Min. Pr. as in (*a*), § 16, *et seq.*; Dallas, 884.
(*c*) 20 Geo. II. c. 50; Jurid. Styles, 1. 553; 3. 691.
(*d*) Ersk. 2. 9. 42.
(*e*) Craig, 2. 22. 5; Statute, as in (*c*).
(*f*) Ersk. as in (*d*).
(*g*) See Milne, 10th June 1837, 15 D. 1104.

367. SUPERIOR UNENTERED.—(1.) When the superior's title is incomplete, the heir it is thought may accept of a precept, trusting that the superior will obtain an entry from the over-superior, and thus validate the precept; or, following the safe course, he will charge the superior, under the statute of 1474 (*a*), to complete his title in the superiority. (2.) If obedience is withheld, the heir will proceed to bring a declarator of tinsel of the superiority, in which the next superior or overlord must be called as a party, that he may be authorised and ordained to receive the pursuer as his own immediate vassal. The same course will be followed upwards to the Crown. (3.) It is incompetent for the heir to charge a disponee of the superior to complete his title, even after infeftment upon the precept in the disposition: until his infeftment is made public and the right of superiority thereby completed in his person, he is not a superior in the sense of the statute, and the heir must apply to the disponer or his heir (*b*). (4.) The Court

have refused to delay proceedings in the process of declarator of tinsel, until the right of superiority should be determined between competitors: the vassal, so long as he remains unentered, cannot exercise the active rights of a proprietor, *e. g.* in removing tenants, or granting warrants for infeftment which are immediately valid; and decree will be pronounced, in order that the heir may obtain infeftment from the over-superior (*c*). (5.) The mode of entry by the overlord is by precept or charter *supplendo vices*, according as the party is an heir or disponee; and in Crown-holdings, a warrant to the Director of Chancery to issue a precept of this sort must proceed on an application to the Lord Ordinary on the Bills (*d*).

(*a*) 1474, c. 57, above, p. 230.
(*b*) Christie, 14th Dec. 1776, B. S. 5. 608; Hailes, 736.
(*c*) Dickson, 1st July 1802, M. 15,024.
(*d*) Christie and Dickson, as above.

368. FORM AND EFFECT.—1. *Variations in form.*—(1.) The term, precept of *clare constat*, is now applied indifferently to all precepts by subject-superiors for the infeftment of heirs; (above, § 366.) The ordinary style (*a*) may be adapted to the case of an entry upon a retour of special service, by the addition of the following words: "And that the said C. is "eldest son, and nearest and lawful heir to the said B., his "father, in the foresaid lands and others, with the pertinents, "conform to special service in his favour as heir foresaid, ex-"pede before the Sheriff of the shire of D. upon the "day of and duly retoured to Chancery." (2.) Sometimes it happens that the superior requires that a general service shall be expeded to prove the propinquity of the heir; but this can only be for his private satisfaction; and as general service is no warrant for a new precept of infeftment, it will not be noticed in the precept. (3.) The entry by precept of *clare constat* without a service, although originally confined to the immediate descendants of the vassal last infeft, is now in practice extended to all kinds of heirs, whether by law or provision, (*hæredes nati vel facti,*) who are able to satisfy the superior that they are truly heirs in the lands (*b*); but it is usual for heirs of entail in all cases to expede a special service (*c*).

2. *Character of the heir.*—The special character in which the heir takes up the right ought to described with equal minuteness as in a service. But in this respect a precept of *clare constat* resembles the special service, in which it is sufficient that the heir be expressed who is truly in the right, if the character by which he is described be not wholly inconsistent with that which he truly bears, and that on the principle, that the lands and documents referred to exclude the supposition on which the objection to an erroneous designation in a general service is founded, that another may be the righteous heir (*d*). Thus, an objection to a precept in favour of one described as nearest and lawful heir, but whose proper character was that of heir of provision, was repelled (*e*).

3. *Must be in terms of the former investiture.*—The precept of *clare constat* is not a competent form for introducing a new vassal into the fee. The right must be renewed as it stood in the person of the ancestor. Thus, a precept granted to the heir in liferent, and another in fee, was held to be inept as to the fiar (*f*). It is even questionable if an heir accepting of a precept which contains new conditions of the grant, renders such conditions effectual. Practice is against the notion, and the only case which seems to bear on the point may be considered as of doubtful authority, as apparently resting on a mere *obiter dictum* (*g*).

4. *A prescriptive but not an active title.*—(1.) The precept of *clare constat* is a good prescriptive title, although not proceeding in virtue of a special service (*h*); but it has not the privilege of a service in excluding questions in regard to the propinquity of the heir after the lapse of twenty years. (2.) It gives an active title only in questions with the superior, who, as bound in implied warrandice from fact and deed, cannot grant a future voluntary precept for infeftment in the same subjects. (3.) This mode of entry, although it does not, like special service, include a general service in the same character, nevertheless infers a universal passive title (*i*).

5. *Does not bar special service.*—It follows, from what is stated in Art. 4, that the entry by voluntary precept is ineffectual in questions with parties not deriving right from the

superior or from the heir. Although the fee therefore is full as regards the superior and his successors, and those in right of the party entered, this sort of entry will not prejudice third parties claiming through the ancestor; and of consequence it cannot bar special service by another, on which the superior may be compelled to grant a precept for infeftment. Service is a judicial means of ascertaining the righteous heir, and is not superseded by the mere private opinion and unauthorised act of the superior; (above, § 339. 2.)

6. *Effect as a warrant for infeftment.*—(1.) This sort of precept, as personal to the heir as such, is specially excepted from the statute which gives effect to procuratories of resignation and precepts of sasine after the death of the granter or grantee (*k*), and it therefore falls on the death of either. For a similar reason it cannot be made the subject of assignation, any more than a precept for infeftment in liferent. (2.) In other respects the precept of *clare constat* does not differ from other warrants for infeftment. Thus, it is thought that a precept granted by one who is himself uninfeft is validated by the subsequent completion of his title; (above, § 154. 2); and, in like manner, when the superior's title stands on a public right unconfirmed, infeftment on his precept is validated by the subsequent confirmation of the public right, even after the death of the grantee (*l*).

(*a*) Jurid. Styles, 1. 571-2.
(*b*) See Crichton, 16th Jan. 1798, M. 15,115.
(*c*) Jurid. Styles, 1. 575.
(*d*) See Crichton, as in (*b*).
(*e*) Durham, 31st Jan. 1798, M. 15,118.
(*f*) Finlay, 20th July 1770, and 27th Jan. 1774, M. 14,480.
(*g*) See Bell's Princ. 1821; Magis. of Edinburgh, 27th June 1717, B. S. 5. 612.
(*h*) Erak. 3. 8. 71; Bruce, 6th Dec. 1770, M. 10,805.
(*i*) Stair, 3. 5. 26; Erak. 3. 8. 71. But see Bell's Princ. 1823, 1914, *et seq.*; Farmer, March 1683, M. 14,008; E. of Rosebery, 16th July 1766, B. S. 5. 926-7.
(*k*) 1693, c. 35, above, p. 100.
(*l*) Lockhart, &c. 16th Nov. 1837, F. C., D.

369. ADVANTAGES OF THIS FORM OF ENTRY.—(1.) Entry

by precept of *clare constat*, besides being the common form of the entry of an heir in lands held of a subject-superior, is often of much practical convenience in completing a progress of titles. It is frequently combined with the charter of confirmation. An entry by precept is competent only when the ancestor died publicly infefted; and it often happens that a disponee dies infefted on the indefinite precept in the disposition of sale. His heir may, in these circumstances, combine the two forms, by obtaining from the superior a *charter of confirmation and precept of clare constat*, whereby the infeftment of the ancestor is made public from its date, and the heir receives a warrant for his infeftment as heir to a vassal publicly entered. Sasine on this deed, in so far as it is a warrant for infeftment, thus completes the title of the heir. (2.) The precept of *clare constat* is likewise of much practical advantage where a fee has been split, and the two fees of superiority and property meet in the same person. Although a proprietor of lands cannot constitute a sub-fee in his own person (*a*), he may, in these circumstances, grant a precept in his own favour as heir in the base fee, when acquired by succession, and being infeft on this warrant, he may consolidate the two fees by resignation *ad remanentiam;* (above, § 161, *et seq.*) (3.) It may be usefully combined with a charter of resignation or of *novodamus* in the following circumstances: A. dies infeft on a charter by progress proceeding upon a procuratory of resignation; but doubts are entertained as to the formality of the charter, the sasine following upon it, or the registration of the sasine. B., his heir, in order to fortify his title, may expede a general service to the deceased, and obtain a new charter from the superior upon the same procuratory, having combined with it a precept of *clare constat*, to meet the supposition that the infeftment of the deceased was formal and valid. The sasine proceeding upon this alternative warrant will, it is thought, effectually vest the fee in the heir.

(*a*) See Redfearn, 7th March 1816, F. C.

370. SASINE ON THE PRECEPT.—The instrument of sasine on the precept of *clare constat* has nothing peculiar in form.

Infeftment must be given on the precept during the joint lives of the granter and grantee (*a*).

(*a*) 1693, c. 35, above, p. 100.

TITLE X. TRUST-ADJUDICATION.

371. NATURE AND EFFECT. — 1. *Origin.* — This kind of entry is founded on the principle introduced by the acts of 1540 and 1621; (above, p. 304); whereby the right of an heir unentered may be attached by a creditor-adjudger, as constructively vested in the heir by the forms prescribed by these statutes. It is said to have been invented by Sir T. Hope, and originated in the advantages resulting from a title, which saved the heir from an unlimited passive representation, at the same time that it enabled him to try the validity of competing rights maintained by other parties, and it was recognised as a valid mode of entry by statute. Accordingly, it is only for the purpose of acquiring a tentative title that the entry by trust-adjudication is employed. Although valid as a title to the lands, the intricacy of the forms prevent its introduction as a substitute for service, where the right is unquestionable; and where the estate is incumbered, an irresponsible entry is obtained by means of service *cum beneficio inventarii.*

2. *Form.*—Adjudication in trust proceeds upon a bond executed by the heir in favour of a friend, for an imaginary debt equal to or exceeding the value of the estate, who, on the other hand, grants a back-bond acknowledging a trust for behoof of the heir. The creditor having thus an *ex facie* absolute claim of debt, uses the procedure of charge and adjudication prescribed by the statutes and forms, (above, § 223,) precisely as if he were a real creditor of the heir. And after obtaining and feudalising a decree of adjudication, according to the state of the title as it stood in the person of the ancestor, he denudes of the feudal right thus acquired, by a conveyance in favour of the heir under the obligation which he undertook by the back-bond. The only objection to giving

decree in this process, as in other adjudications, is the production by the competitor of an unquestionable title, instantly verified.

3. *Effect.*—(1.) Trust-adjudication is thus the ordinary form of making up a title in doubtful cases. It is a mode by which the heir merely vests in himself that right which he is truly entitled to; and as the fictitious nature of the transaction can plainly afford no good objection to a third party, the title thus completed is a valid title in the person of the heir to the extent of the right to which he has a well-founded claim, leaving it to be ascertained by future discussion. The heir in this manner avoids all interference with the claims of others. If it turns out that a competing party has a preferable claim to the lands, this form of entry goes for nothing, and does no harm to the competitor. If the heir's right, on the other hand, is sustained, he has the advantage of having made up a title, which will in the meantime vest in him the power necessary to execute a settlement of the subjects (*a*). A trust-adjudication, in short, is in the same situation as any other adjudication on a charge: it therefore conveys to the trustee, and ultimately to the truster, no more than he is truly in the right of. It is when the decree of adjudication is feudalised, and a claim of possession made under it, that the rights of third parties come into operation (*b*). (2.) The title acquired by the heir is not only an active title to the effect of enabling him to challenge competing rights to the lands, even such as have been completed by infeftment; but it is a valid feudal title, which transmits to his own heirs. It would appear, indeed, that most of our land-rights have at one period or another been transmitted by this form (*c*). (3.) Adjudication in implement of a conveyance by the heir has not been allowed the effect of adjudication on a trust-bond (*d*). (4.) Trust-adjudication is said to be incompetent in those cases where the service of the heir in the same character is excluded by the prior service of another, upon the *ratio*, that adjudication proceeds upon a charge against the heir to make up a title in the character in which the diligence is intended to be directed against him (*e*).

(*a*) See Beveridge, 10th July 1793, M. 5296.

(*b*) A. S. 22d Feb. 1662; 1695, c. 24, above, p. 206; Stair, 3. 6. 14; Bankton, 3. 5. 101-2; Erak. 3. 8. 72. See Glendonwyn, 22d Jan. 1662, M. 9738; Craigie, 19th Jan. 1808, M. App. *v. Adjudic.* No. 16. See Carmichael, 15th Nov. 1810, F. C.

(*c*) Gordon, 17th Feb. 1761, M. 14,070; Hepburn, 25th July 1781, M. 14,487; Beveridge, 10th July 1793, M. 5296. See Ballenden, 6th June 1823, 2 S. 369; affirmed, 1 W. S. 381.

(*d*) Dunlop, 31st March 1824, 2 S. Ap. 115.

(*e*) Lord Moncreiff, in Rutherfurd, 12th Nov. 1830, F. C., 9 S. 3.

CHAPTER VII.

EXTINCTION OF FEUDAL RIGHTS.

TITLE I. RESIGNATION AD REMANENTIAM.

372. FEUDAL EFFECT.—1. *Extinguishes the fee.* (1.) The nature of the feudal form and ceremony of *resignation* is explained above; (§ 95, 154.) As a mode of transmitting a fee to a singular successor, it is completed by charter and sasine, and is called *resignatio in favorem.* When employed on the other hand to give back the fee to the superior, it receives the name of *resignatio ad perpetuam remanentiam.* By this latter form, the fee, according to the most obvious feudal principles, necessarily becomes and remains the superior's absolute property, because he undertakes no obligation to confer infeftment on another; and thus the subaltern right is extinguished, or, as it is expressed, consolidated with the superiority; (above, § 161, *et seq.*) (2.) The term extinction, as applied to a right of fee, is by some thought to be incorrect, on the ground that the right is not destroyed, but sopited, by becoming merged in the more eminent right of superiority. But the subaltern infeftment, as such, appears to be to all intents and purposes extinguished, as it cannot be afterwards transmitted by succession or conveyance. It may, indeed, be revived by new creation—by the granting of an original charter; but this is exclusively a mode of constitution and not of transmission. On this subject, indeed, Lord Stair's authority is express. "Infeftments (he observes) are extinct by "consent—by resignation made by the vassal who stands in-"feft in the lands to his superior *ad perpetuam remanentiam;*" "for, in the same way that their constitution was perfected by "an instrument of sasine, their destitution is consummated "by an instrument of resignation (*a*)."

2. *Exception.*—The effect of this form, which is of a purely feudal nature, is, in one instance, excluded by the indirect operation of statute. Resignation *ad remanentiam*, in the hands of the proprietor of a superiority held under strict entail, although it effectually vests in him the right of property, does not consolidate the two fees so as to bring the *dominium utile* within the fetters of the entail. The right of property having existed as a separate fee cannot be brought within the operation of the statute of entails, which requires registration in a special register to give force to the fetters, by a merely feudal ceremony not combined with the statutory requisites, and performed after the completion of the forms which imposed those fetters on the right of superiority. But the exception does not include redeemable infeftments, which are mere burdens on the right of fee (*c*).

(*a*) Stair, 2. 11. 1.

(*b*) Heron, 27th April 1738, Cr. and St. 1. 498; Galbraith, 14th Jan. 1814, F. C.; Wauchope, 14th Dec. 1815, F. C. See above, § 252.

373. PROCURATORY (*a*).—A warrant, called a procuratory for resignation *ad remanentiam*, comes in place of the disposition when the property is conveyed by the vassal to his superior. It may, in like manner as the disposition, be granted by a commissioner for the vassal, or by trustees, heritable creditors, or others having a power of sale. The procuratory may be in a separate form, or embodied in the disposition of sale.

(*a*) I hereby MAKE CONSTITUTE and ORDAIN and each of them my very lawful and undoubted procurators for me and in my name to compear before the said B. his heirs or successors immediate lawful superior of the lands and others before and after specified or before their commissioners in their names having power to receive resignations thereof *ad remanentiam* at any time and place lawful and convenient and then and there purely and simply by staff and baton as use is to resign and surrender likeas I the said A. do hereby RESIGN and SURRENDER *simpliciter* UPGIVE OVERGIVE and DELIVER ALL and WHOLE *(the subjects)* together with all right title and interest which I have or can pretend to the same in the hands of the said B. or his foresaids as immediate lawful superiors of the same or in the hands of or their said commissioners in their names as in their own hands and for their behoof *ad perpetuam remanentiam* to the effect that the right of property of the said lands and others which stands in my person as aforesaid may be united and consolidated with the right of superiority

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of the same standing in the person of the said B. and remain inseparable therefrom in the person of the said B. his heirs and successors in all time coming acts instruments and documents in the premises to ask and take and generally every other thing to do as freely in all respects as I the said A. could do myself if personally present or which to the office of procuratory in such cases is known to pertain promising to RATIFY and CONFIRM whatever my said procurators shall lawfully do or cause to be done in the premises.

374. INSTRUMENT (*a*).—1. *Title of the superior.*—The consent of the superior, which is essential to the extinction of a subaltern fee, (above, § 56. 7,) cannot be feudally given unless he be himself entered and infefted; at least, in order to validate the feudal ceremony, a title must afterwards be completed in his person, which, it is thought, will accresce to the resignation; (above, § 154. 2.) Resignation thus made has been assumed to be valid; indeed, in a recent case, the Court seem to have held, that resignation *ad remanentiam* in the hands of a superior whose title was never completed was effectual to extinguish the subaltern fee; but that determination may perhaps admit of question (*b*).

2. *Form of the instrument.*—The fact of resignation having been duly made is certified by an instrument of resignation *ad perpetuam remanentiam.* The ceremony ought to be strictly performed, the symbol being a staff or baton. The instrument is authenticated by a notary and two witnesses, in like manner as the instrument of sasine.

3. *Registration.*—The instrument is perfected by registration in the same register with sasines, and within sixty days of its date. At the period of the enactment of the statute of 1617, the rule of *ipso jure* consolidation being in full operation, and embracing a variety of cases, it is probable that the advantage of preserving a register of instruments of resignation *ad remanentiam* was not then apparent. This instrument is accordingly not among those enumerated in that statute. This defect was supplied by another enactment (*c*).

4. *Effect.*—When duly completed the instrument of resignation *ad remanentiam* invests the resignatary, and of consequence divests the resigner. Its effects may be said to resemble in all respects those of a registered sasine duly confirmed by the superior. The right resigned may be validly

affected with a reserved burden, which may be rendered effectual by a power of sale attached to the reservation (*d*).

5. *Erasures, &c.*—Vitiations follow the rules which apply to instruments of sasine; (above, § 24.)

(*a*) IN THE NAME OF GOD AMEN. BE IT KNOWN TO ALL MEN by this present public instrument that upon the day of and of the reign of our Sovereign Lady Victoria by the grace of God of the united kingdom of Great Britain and Ireland Queen Defender of the Faith the year; IN PRESENCE of me notary-public and witnesses after designed and hereto subscribing compeared personally C. as procurator for A. heritable proprietor of the lands and others after described specially constituted by virtue of a procuratory of resignation *ad remanentiam* dated made and granted by the said A. for resigning the lands and others after described in favour of B. his heirs and successors immediate lawful superiors of the same and PASSED with us to the personal presence of the said B. superior of the same and there the said C. as procurator for and in name of and behalf of the said A. RESIGNED and SURRENDERED *simpliciter* UPGAVE OVERGAVE and DELIVERED ALL and WHOLE *(the subjects)* together with all right title and interest which the said A. had or anywise might have claim or pretend to the said lands and others above described or to any part or portion of the same in the hands and in favour of the said B. immediate lawful superior thereof *ad perpetuam remanentiam* to the effect that the right of property of the same standing in the person of the said A. may be consolidated with the right of superiority of the same standing in the person of the said B. and remain and abide inseparable therefrom in all time coming by virtue of and conform to the foresaid procuratory of resignation *ad remanentiam* granted by the said A. for that effect and that by deliverance made by the said C. as procurator foresaid of staff and baton as use is in the hands of the said B. who accepted of the same WHEREUPON and upon all and sundry the premises the said C. as procurator foresaid asked and took instruments in the hands of me notary-public subscribing. These things were so done at day month and year of God and of the Queen's reign before written betwixt the hours of and in presence of and witnesses to the premises specially called and required and hereto with me subscribing *(The instrument is attested in the same manner as the instrument of sasine; see* § 21, 22.)

(*b*) See Grant, 22d Feb. 1760, M. 8740. Here the competency of a resignation *ad remanentiam*, employed in completing the chain of titles described in the report, in the hands of a superior uninfeft, was assumed, the title of the superior having been afterwards completed. See also Redfearn, 7th March 1816, F. C. But in the recent case of Gibson-Craig, 10th July 1838, (not yet reported,) the decision in Redfearn has been questioned, on the ground that the express consent of the superior is essential to the extinction of a sub-fee; (Hunter, 16th Dec. 1834, F. C., S.); a consent, which a superior, not himself feudally invested, is incompetent to grant.

(*c*) 1669, c. 3. OUR SOVERAINE LORD with the advice of the Estates of Parliament STATUTES and ORDAINS that all instruments of resignation that shall be made in the superiour's hands *ad remanentiam* be registrat within threescore

dayes after the date thereof in the same manner and way and at the same rates as renunciatiouns seisings or reversions to the effect the leigis may the better know that the infeftment which was granted to the resigners is thereby void and extinct, and that they may be put *in mala fide* to contract with the resigner thereanent, or to comprise the same from him otherwayes the said resignation to be null. It is alwayes DECLARED that the instruments of resignation of tenements lands and fishings holden in free burgage being registrat in the town court books of the burgh shall not fall within the certification of this present Act.

(*d*) Fraser *v.* Wilson, 13th Feb. 1822, F. C., 1 S. 316; affirmed, 2 S. 162. See above, p. 199, § 136.

TITLE II. DISCHARGE AND RENUNCIATION.

375. FEUDAL EFFECT.—1. *Extinguishes redeemable rights.*—Simple renunciation made extrajudicially by deed, was not originally admitted to extinguish feudal rights, even of a redeemable nature, unless combined with resignation *ad remanentiam* (*a*). But this effect was given to judicial renunciation, or, in the words of Craig, *quæ procedit ex sententia ut in redemptionibus necessariis ac voluntariis.* Decrees of Court formed with their warrants the only records then in existence. The effect was extended to renunciations of wadsets, upon the introduction of the register of real rights, if duly recorded (*b*); and the rule was applied by the Court, although not without difficulty, to renunciations of rights of annualrent, from their obvious analogy to wadsets (*c*). These rights have by degrees changed into the existing forms of securities; (above, 197-8.); and as the mode of extinguishing redeemable rights has relaxed as a consequence of the rule that the feudal infeftment is merely accessory to the personal obligation, the effect of a formal and registered renunciation, to extinguish even the infeftment on the bond and disposition in security, has never been doubted. The analogous rights constituted by adjudication, heritable bond, real liens and the like, followed by sasine, are validly extinguished by the same means, as are likewise servitudes, (including liferents,) wadsets and reversions.

2. *How far essential.*—The question which is of so much importance in a practical view, is not of the validity of the renunciation, but how far renunciation is essential to the extinction of redeemable rights. (1.) It was declared by sta-

tute, that *intromission* should extinguish not only the annualrent of an adjudger's debt; but if amounting to more, "shall "be ascribed in payment and satisfaction of his principal sums "*pro tanto* (*d*)." And the rule has been extended to those modern securities, under which the creditor has a title to assume possession of the subjects, from their obvious analogy to adjudications, and that in a question even with singular successors; but a creditor in possession is not bound to retain, and impute the amount of his super-intromissions to the principal sum: he may pay the balance, after satisfying interest, to the debtor, even where the subjects are burdened with postponed securities (*e*). (2.) It came at an early stage in the transition of the annualrent right into the modern heritable bond to be held as a necessary consequence of the personal obligation, that sums recovered by means of *diligence*, in like manner as those received by a possessor, by means of his intromission with the rents, were imputable towards the extinction of the security, both as regards principal and interest (*f*). The effect thus given to diligence and intromission results from the nature of rights in security. Diligence or intromission being available to the creditor, as a competent mode of obtaining payment, must, on the other hand, to the extent of the sums received or recovered, relieve the debtor, who may not have it in his power to obtain a formal discharge. (3.) It may perhaps be doubted, however, if *voluntary payment* made towards the principal, without a registered discharge, is effectual as in a question with a singular successor. The debtor has himself to blame that the register is not cleared of the burden, to which he has permitted a third party to acquire right *in bona fide*. At least it does not appear that the point has been as yet determined. It is, indeed, broadly stated by Mr Erskine (*g*), that securities by bond, as being accessory to personal obligations, are extinguished by discharges unregistered, by payment or intromission; but in the report of the case on which his opinion is rested (*h*), it is expressly mentioned, that the question as to the effect of voluntary payment was reserved; and in a later instance, the decision may be thought to have proceeded in a considerable degree on specialties (*i*).

(4.) *Compensation* seems to be available against singular successors, on such debts only as were due prior to infeftment (*k*).

3. *Practical result.*—In the state of the law alluded to in Art. 2, it is the interest of the debtor in every possible case to obtain and put on record a formal discharge and renunciation, not trusting to the effect of intromission, diligence, payment or compensation; and on the other hand, a party taking an assignation to a constituted security or adjudication, ought not merely to be satisfied that the burden remains on the register, but when there is any doubt, to obtain the concurrence of the debtor to the assignation. Such concurrence is not, however, an absolute protection against future exceptions, but in questions with the debtor only. Competing creditors, it is thought, may avail themselves of the plea of extinction by intromission, &c. A purchaser, again, ought in all cases to require that the register be formally cleared of all burdens which have been duly constituted, and are not obviously extinguished by prescription.

(*a*) Craig, 3. 1. 20-22.

(*b*) 1617, c. 16, above, p. 121.

(*c*) Stair, 2. 5. 15; Dunbar, 23d Nov. 1627, M. 570; Maclellan, 7th Jan. 1680, M. 571.

(*d*) 1621, c. 6.

(*e*) Ersk. 2. 8. 34, and 12. 37; Wishart, 4th Feb. 1671, M. 9978; Hope &c. (Heirs of Learmonth,) 2d Jan. 1705, M. 574 and 9989; Baillie, 25th Jan. 1711, M. 9990.

(*f*) Ersk. as above; Rankin, 8th July 1680, M. 572.

(*g*) Ersk. 2. 8. 34.

(*h*) Rankin, as in (*f*).

(*i*) Macdowal, 8th June 1714, M. 576.

(*k*) Rankin, as in (*f*); but see Ersk. 3. 4. 15, on authority of Leys, 18th June 1675, M. 286.

376. FORM.—1. *Heritable bonds, &c.* (*a*).—The clauses of the discharge and renunciation are artificial and intricate in a degree much greater than the case requires. From the explanatory statement in § 375, it seems to follow, that a simple discharge of the debt operates as an extinction of the security in a question with the debtor, and that there is a necessity for caution on the part of a singular successor only where no evidence of payment appears in the register (*b*). The ordi-

nary style of the deed, (taking the discharge and renunciation of an heritable bond and sasine as an example,) consists, *first*, of an acknowledgment and discharge of the principal sum and interest; *secondly*, a renunciation in favour of the debtor, and his heirs and successors, not only of the annualrent but likewise of the lands themselves; *thirdly*, a declaration that the annualrent is redeemed, and the lands loosed and disburdened of the infeftment; *fourthly*, a renunciation and release of the lands in favour of the debtor, and his heirs and successors, to be by them enjoyed and possessed free and disburdened of the security; *fifthly*, clause of absolute warrandice of the discharge and renunciation; *sixthly*, clause of registration for execution and preservation, and also in the register of sasines, &c. for publication; *lastly*, testing clause. The essential part of the deed is the acknowledgment of payment, which forms the evidence of implement of the personal obligation, and consequently of the extinction of the infeftment in security.

2. *Variations.*—(1.) If the bond has not been feudalised, it is not doubted that a simple discharge is sufficient. The man of business will in all cases require re-delivery of the bond, instrument of sasine, and other title-deeds. (2.) A form, called a deed of restriction and renunciation (*c*), is employed where part of the lands over which a security has been constituted are sold, and it is conditioned that the burden, in place of being absolutely discharged, shall remain over those subjects which continue the property of the seller. (3.) When lands so burdened are entirely disposed of, a discharge of the personal obligation in the seller's bond is sometimes granted by the creditor, he receiving a separate personal bond of corroboration from the purchaser. This arrangement must, it is feared, be regarded as subject to considerable risk. At least it is difficult to understand that the merely accessory right should subsist after the principal branch of the deed, the personal obligation, has been discharged; and although the Court are said to have in one instance approved of a similar arrangement, the question does not appear to have yet occurred in a competition of real rights (*d*). (4.) The form of discharge and renunciation may be employed to extinguish

the right of an assignee to an heritable security, retrocession being unnecessary for re-investing the original creditor (*e*).

3. *Wadsets.*—The discharge and renunciation (*f*) of rights of wadset does not, in the ordinary case, essentially differ from that of the heritable bond. But where the security is in the form of a *proper* wadset, which is not affected by intromission, or accessory to a personal obligation, and is held by the wadsetter of the reverser's superior, a registered discharge and renunciation does not extinguish the feudal right, which must be reconveyed to the reverser in order that he may again enter with the superior (*g*).

4. *Liferents, reversions, &c.*—Rights of the nature of liferent, which are not contingent on the existence of a personal obligation, must be formally *renounced*, not merely *discharged* like sums of money (*h*).

(*a*) Jurid. Styles, 1. 643, *et seq.*
(*b*) See Wilson, 28th Feb. 1751, M. 40, 41.
(*c*) Jurid Styles, 1. 645.
(*d*) Jurid. Styles, 1. 646, and case of Lyell, 6th July 1816, mentioned in note.
(*e*) Mackenzie, 23d Dec. 1837, D.
(*f*) Jurid. Styles, 1. 638.
(*g*) Jurid. Styles, 1. 641.
(*h*) Jurid. Styles, 1. 648-9.

377. REGISTRATION.—(1.) The statute of 1617, establishing the register of real rights, makes mention only of "re-"versions, regresses, bands or writs for making of regresses "or reversions, assignations thereto, discharges of the same, "renunciations, wadsets and grants of redemption, and sick-"like all instruments of sasine (*a*)." Discharges of rights of annualrent constituted in the old form and truly wadsets of a yearly sum payable out of feudal subjects, were at an early period held to be virtually embraced by the enactment; but it is to practice alone that we are indebted for the valuable rule, that all discharges of redeemable rights must appear in the register. The rule thus established has been sanctioned by the Court; (above, § 374-5.) (2.) Such discharges are not, however, of the nature of instruments of sasine or resignation *ad remanentiam*. They are useful merely as evidence

of a fact; the consent of the party in right of the burden to its extinction, and the limitation of the period for registration to sixty days, has not been applied to renunciations of securities by bond and the like. The Court have in more than one instance granted special authority for their registration after the expiry of that term (*b*), and it is understood that in practice they are received by the keepers without any warrant.

(*a*) 1617, c. 16, above, p. 121.
(*b*) See E. of Glencairn, 1749, M. 13,575.

TITLE III. REDEMPTION.

378. WADSETS.—Lands conveyed in wadset were, by our old law and practice, redeemable only after the using of particular forms of premonition and consignation in terms of the right of reversion, when the wadsetter refused voluntarily to renounce his security (*a*). In our present practice action of declarator is sustained without the use of these formalities (*b*), in which the reverser must call as parties not only the wadsetter, but those holding subaltern infeftments under him (*c*). The decree pronounced in that action is conditional on consignation in terms of the reversion; and consignation is valid when made in current gold and silver coin, although otherwise stipulated; but the reverser may object to bank-notes as not a legal tender (*d*). The old forms may still be employed.

(*a*) Ersk. 2. 8. 17, *et seq.*
(*b*) D. of Gordon, 2d March 1756, M. 16,543, B. S. 5. 383.
(*c*) Macneil, 25th Feb. 1794, M. 16,555.
(*d*) 1555, c. 37; D. of Gordon, as in (*b*).

379. BONDS AND ADJUDICATIONS.—Lands burdened with voluntary securities by bond, or judicial by adjudication, may, like wadsets, be redeemed by means of declarator and consignation. But a refusal to accept of payment can scarcely occur in practice, unless where a question arises as to the rate of interest (*a*). The creditor has by the bond a certain period, usually from two to six months, as may be agreed on by the

parties, for making arrangements to receive payment, and reinvest his money; and when the loan is to be paid up, and *premonition* is given to the creditor, he is entitled to the full stipulated period. Consequently he cannot, without his own consent, be deprived of the full interest at the rate expressed in the bond, by consignation being made by the debtor before the expiry of the term of premonition; nor will the strongest indication by the creditor of his desire to have his money, such as the using of the diligence of poinding the ground, deprive him of his privilege (*b*).

(*a*) Jurid. Styles, 1. 659.
(*b*) Munro, 19th Jan. 1838, D.

TITLE IV. AMISSION.

380. LOSS OR DESTRUCTION OF TITLE-DEEDS.—Writing being essential to the constitution of feudal rights, it follows that the irretrievable loss or destruction of title-deeds must absolutely extinguish the right which they are the means of establishing. Our practice admits of a remedy for accidental amission in the form of a judicial process, called an action of *proving the tenor*, which has been received from the necessity of the case, since the accidental loss of documents, by robbery, shipwreck, or other similar misfortunes, or their destruction by fire, by accidental cancellation or obliteration, or through design on the part of those having an adverse interest, would otherwise produce incalculable injury to proprietors of feudal rights. For the same reason, the evidence of witnesses must, to a great extent, be relied on in this action; and, from the nature of the question, the proof in each individual case must, in a great degree, depend on its own circumstances (*a*). It may not be out of place, in a work of this nature, to advert, in a general way, to some of the leading features of the forms of proceeding by which the tenor of feudal titles may be restored.

(*a*) Stair, 4. 32. 1, *et seq.*; Ersk. 4. 1. 54, *et seq.*

381. WHAT WRITS MAY BE RESTORED.—(1.) The tenor of all writings of whatever nature, with the sole exception, per-

haps, of letters of horning and their executions, seems capable of being restored by means of the process of proving the tenor, unless holograph writs be likewise considered as excluded. It was, indeed, at an early period doubted whether the tenor of decrees of apprising, from the strictly technical nature of the proceedings, could be made up from adminicles, however pregnant; but this notion has not been sanctioned in recent practice, although much caution is used in allowing the tenor of judicial acts, or steps of diligence, to be established (*a*). (2.) It was in an early case held, that the tenor of a writing alleged to have been holograph, could not be made up in an action of proving, for the reason that, in regard to holograph deeds, it is not enough to prove that writings of the purport libelled had once existed, since, with respect to a writing alleged to be in the granter's handwriting, it behoves the party founding on it to bring proof, both that it is in the genuine handwriting of the granter, and was subscribed of the date which it bears,—evidence which, after the disappearance of the document, cannot be obtained (*b*). But the Court have not considered that any absolute rule exists to exclude a proof of the tenor of a deed alleged to have been holograph, and they have accordingly, in special circumstances, disregarded the authority of the case of Fraser (*c*).

(*a*) 1579, c. 94; Ersk. 4. 1. 58; Airth, 14th March and 21st June 1707, M. 15,813. See 29th Nov. 1755, B. S. 5. 837; D. of Argyle, 29th June 1781, M. 15,828; Duncan, 26th June 1827, 5 S. 840; Clyne, 28th Nov. 1832, 11 S. 131; Stewart, 15th May 1835, 13 S. 765; L. Lynedoch, 28th Jan. 1836, 14 D. 374.

(*b*) Fraser, 16th June 1784, M. 15,830.

(*c*) Lillies, 4th Dec. 1832, 11 S. 160; Robertson, 22d June 1833, F. C., 11 S. 775.

382. IN WHAT CASES PROVING OF THE TENOR ESSENTIAL. —(1.) A distinction has been drawn, although it has not been implicitly acted on, between the case of a writ necessary to found or support an action, or to establish a permanent right, and one proposed to be used merely in defence, or as proving the extinction or restriction of a debt. In some instances the tenor of documents has accordingly been sustained on pregnant evidence without a formal action of proving (*a*). (2.) The tenor of particular clauses, or parts of a

writing, accidentally, fraudulently or forcibly obliterated or destroyed, has, in like manner, been, in some instances, restored incidentally (*b*); and when an opposing party can be shewn to have destroyed a document essential to the case, its terms may, in a question with him, be established incidentally by evidence of a more slender kind than would be requisite in a formal action of proving the tenor (*c*).

(*a*) Maxwell, 9th Nov. 1742, M. 15,820; Synod of Merse and Teviotdale, 21st Nov. 1753, M. 15,823; Hutchison, 17th May 1823, 2 S. 318; Boyd, 5th June 1823, 2 S. 363.

(*b*) Hume, 17th July 1712, M. 15,819 and 14,967; Ronald, 3d July 1830, 8 S. 1008.

(*c*) See Ross, 28th Feb. 1833, 11 S. 467.

383. PROCEDURE IN PROVING OF THE TENOR.—The writ sought to be restored must be recited in the summons of the action, and a *casus amissionis*, either general or special, according to the nature of the document, libelled (*a*). This action is competent only before the Court of Session; and the Court have been in use to refuse a commission for taking evidence, unless where the witnesses are infirm or of great age (*b*).

(*a*) Stair, 4. 32. 5; Begbie, 9th March 1822, 1 S. 391. See E. of Stirling, 2d March 1833, 11 S. 506.

(*b*) Ersk. 4. 1. 58; Balnagown, 28th Jan. 1663, M. 15,790, 545; Smart, 23d July 1673, B. S. 3. 149; Gordon, 28th Feb. 1752, M. 15,823; Scott, 24th Jan. 1787; Hailes, 1015; Ferrier, 14th May 1823, 2 S. 305.

384. EVIDENCE IN PROVING OF THE TENOR.—1. *Casus amissionis.*—It is laid down by Stair as essential, in all cases, to libel the *casus amissionis*, or accident by which the writing came to be lost or destroyed. (1.) But a distinction has been drawn between the case of documents, such as charters and dispositions of heritable rights, discharges and renunciations, decrees of irritancy and the like, as well as securities by bond and infeftment, (which, having been feudalised, are in practice extinguished by formal discharge and renunciation,) as being writs which are designed to remain in the constant possession of the grantee; and personal bonds and other obligations intended for a temporary purpose, which are validly extinguished by being returned to, or, as it is styled, *retired*

by the debtor on payment or performance (*a*). Writs of the former class (or proper feudal titles) may be restored without libelling or proving a special *casus amissionis*, but simply that they were lost or destroyed; whereas the loss or destruction of those of the latter description must, in the general case, be expressly established, in order to overcome the presumption that the obligation was by the creditor cancelled or given back to the debtor. (2.) But this rule admits of exceptions, and the Court have sustained the tenor of a cautionary obligation without evidence of a special *casus amissionis*, in circumstances which excluded the presumption of its having been voluntarily re-delivered to the obligant (*b*).

2. *Adminicles.*—(1.) These are not in all instances essential in a proving of the tenor: they will be dispensed with from the necessity of the case, since, where relative writings do not exist, the injury consequent on the loss or destruction of a deed would otherwise be without remedy; and if the document should be a step in a progress of title-deeds, the right might thereby be extinguished (*c*). But in cases relating to proper feudal titles, although the tenor of particular clauses, such as a procuratory of resignation, as being customary in deeds of conveyance, or the holding of the subjects, as being shewn by the possession, may be made up on parole evidence(*d*), there would probably be found much difficulty in having the tenor of an entire document sustained without some adminicle in writing. (2.) Adminicles are more readily dispensed with when a presumption maintains in favour of the existence of the writ, *e. g.* in the case of a contract of marriage between spouses possessed of heritable property, or when fraud or violence is established against an opposing party (*e*). (3.) Adminicles are of various kinds: they may have express relation to the terms of the writ, or be merely explanatory of its essential parts, or they may combine both these qualities. (4.) The writ, for example, may be recited in other authentic documents. Thus, the tenor of a charter was sustained without the aid of witnesses upon the adminicles of an instrument of sasine wherein it was engrossed *ad longum*, and certain decreets bearing production of the charter and consequently its reception in evidence as an authentic document (*f*). Thus, also, the tenor of an instrument of sasine following

upon a heritable bond, and of a precept of *clare constat* and the sasine proceeding upon it in favour of the heir of the creditor in the bond, were held to be sufficiently made up by the following adminicles, viz. the heritable bond, extracts of the two sasines from the register, and a decree of poinding the ground founded upon them (*g*). But a sasine, or an extract of a sasine, which is a mere supplemental writ, is not of itself sufficient to establish the tenor of a disposition or other deed of conveyance, since it were easy to forge a disposition, and after infeftment on it had been completed, to destroy the false deed, and bring a proving of its tenor on the strength of the sasine (*h*). A sasine supported by another adminicle was, however, in the same case, sustained as sufficient to admit the case to farther probation by witnesses. In another instance, where the question occurred with the disponer's heir, the tenor of a disposition was sustained upon the adminicle of a relative deed narrating the disposition to which the granter had subscribed as witness, joined with the testimonies of those who had seen and read the disposition (*i*). (5.) An extract from a competent register would, it is thought, be sustained to prove the tenor of a deed recorded for preservation, if lost or destroyed in the course of being used as evidence in a court of law; but the occurrence of such a case is by no means probable (*k*). The same effect would not be due to an extract from a register of probative writs, since the principal document is given back to the party. (6.) Scrolls and other incomplete writings will, in favourable circumstances, be received, if supported by the evidence of witnesses; but the mere draughts of deeds, and even perfect documents, prior in date to the deed sought to be restored, are admitted with great caution: preceding documents can of themselves furnish no evidence of the essential fact that the writ alleged to have existed was truly executed (*l*). (7.) Notarial copies are received as adminicles; but they must be supported by other evidence (*m*).

3. *Writer and witnesses.*—The purpose of proving of the tenor being not merely to restore the deed in the terms in which it originally existed, but likewise to establish its authenticity (*n*), it came after the enactment of the statute of 1681 to be made a question, whether the names and designations of the writer and witnesses were not parts of the deed essential

to be inserted in the tenor to be made up in the action. The affirmative was in more than one instance held, on the ground that a party whose interests were affected by the deed would be placed in a worse situation, by having to contend against the evidence of a document made up in a proving of the tenor, than if it were an original writing, unless the writer and witnesses were inserted, since he would otherwise be excluded from a proof of the falsehood of the deed by the evidence of those persons. But this *ratio* was rejected in the House of Lords (*o*); and the Court have since been in use to sustain the tenor of writings which are truly shewn to have existed and been acted on as probative documents, provided no objections in point of form are adduced by the opposing party, and that the substantial parts of the writing are established; and they have even disregarded the omission of the names of notaries signing for parties unable to write their names (*p*).

4. *Oath of party.*—Proof by oath of party seems in all cases to be competent (*q*).

(*a*) Stair, 4. 32. 3. 5. 6; Ersk. 4. 1. 54; Ogilvie, 22d Jan. 1612, M. 15,786; Chancellor, 2d Dec. 1735; Elch. *v. Prov. of the Tenor*, 2; Gordon, 21st Nov. 1749, M. 15,823, B. S. 5. 776; D. of Argyle, 29th June 1781, M. 15,828; Moffat, 31st Jan. 1809, F. C.; Kerr, 3d July 1830, 8 S. 1008.

(*b*) Forbes's Trustees, 1st March 1827, F. C., 5 S. 497.

(*c*) Ersk. 4. 1. 55; L. Fendraught, 19th July 1631, M. 15,788, (Seton,) B. S. 1. 218; E. March, 19th July 1743, M. 15,820; Mackenzie, 12th Dec. 1835, 14 D. 144.

(*d*) Kay, July 1767, B. S. 5. 935.

(*e*) Lauder, 27th May 1622, M. 15,787; Cranstoun, 22d Jan. 1674, M. 15,794.

(*f*) Kinnier, March 1685, M. 15,804.

(*g*) Inglis, 26th June 1712, M. 15,819, 2744. See Melross, 24th July 1622, M. 15,787.

(*h*) Douglas, 15th Dec. 1702, M. 15,807.

(*i*) Baillie, 21st Feb. 1680, M. 15,800.

(*k*) See Macdowal, 25th Nov. 1713, B. S. 5. 98; A. and B. Feb. 1682, M. 15,802.

(*l*) See Cunningham, 9th June 1674, M. 15,794; Harroway, 12th June 1667, M. 15,791.

(*m*) See Anderson, 27th Nov. 1675, M. 15,796.

(*n*) Stair, 4. 32. 8. 9.

(*o*) Ersk. 4. 1. 57; Blackwood, 26th Jan. 1713, M. 15,819, Robertson's Ap. 211.

(*p*) Merry, 21st Nov. 1835, 14 D. 36.

(*q*) Stair, 4. 32. 7; Ersk. 4. 1. 55.

385. EFFECT OF DECREE OF PROVING THE TENOR.—A decree of the Court sustaining the tenor of a writ as sufficiently made up, gives it that effect only which was due to it in its original state; although it is not to be doubted that a party having an adverse interest, who makes appearance in the action, will afterwards, in the general case, be excluded from excepting to the writ, either as false or informal (*a*).

(*a*) Stair, Erak. as in § 384.

TITLE V. PRESCRIPTION AND CONFUSIO.

386. PRESCRIPTION.—The effect of prescription in extinguishing feudal rights is noticed above. (See *Seller's Title.*)

387. CONFUSIO.—Feudal rights which are mere burdens on the fee, and may be extinguished by payment or intromission, (above, § 375,) are necessarily extinguished *confusione*, when the same party becomes both debtor and creditor in the right (*a*).

(*a*) Erak. 3. 4. 23, *et seq.*; Bell's Princ. 580, *et seq.* See Hog, 11th Dec. 1832, F. C., 11 S. 198, and note to Lord Medwyn's judgment.

CHAPTER VIII.

OF BURGAGE RIGHTS.

TITLE I. ABSOLUTE CONVEYANCES.

388. DISPOSITION OF SALE.—1. *Introductory remarks.*—(1.) Lands held by the tenure of *burgage* belong to the corporation as a Crown vassal; (above, § 35.) After the erection of a burgh, and the first constitution of the feudal right, there is thus no room for a renewal of the investiture. The portions of the common subject parcelled out to the individual burgesses are transmissible, indeed, to heirs and singular successors, but the subject as a whole never changes its owner. Nor is it consistent with the nature of burgage conveyancing, as before briefly defined, that it should contain deeds of constitution. The property of the individual burgesses was not originally acquired by charter but by resignation, the council, as representing the corporation or community, being proprietors but not superiors of the common subject; and in parcelling it out originally, or disposing at the present day of such portions of it as may come into their hands, they act as disponers in the ordinary sense of the term, and grant warrant for resignation in the hands of the magistrates as the Queen's bailies. The magistrates of the burgh bear that character, not as commissioners directly appointed by the Sovereign, but under an express statute (*a*), and thus exclude the ordinary officers of the Crown. A title by resignation in the hands of the Crown is accordingly inept in competition with a right completed in the ordinary burgage form (*b*). (2.) The form of charter has been held inapplicable to this kind of holding. It is true that the town-council have, by inveterate usage, confirmed by decisions of the Court and the opinions of our institutional writers, and

recognised by statute, acquired the power of granting the common property in *feu-farm*; but such holding is not presumed, and must not only be expressed, but constituted with sufficient formality to exclude objections, which, if sustained, would throw back the subject to its original tenure (*c*).

2. *Form.*—The disposition of sale differs from the same deed, in the ordinary holdings of feu and blench, in having a procuratory of resignation as the only feudal clause. It warrants resignation in the hands of the bailies of the burgh, as in the hands of her Majesty, in favour of and for new infeftment to the purchaser. In other respects reference is made to the ordinary form of the disposition of sale.

(*a*) 1567, c. 27. Forsameikle as the great hurt done of before within burgh, by giving of sasings privatlie, without anie bailie, and ane common clerk of burgh, quhairthrow our Soveraine Lordis liegis may be defrauded greatlie. THEREFORE it is STATUTE and ORDAINED be our Soveraine Lord, with advise and consent of my Lord Regent and three Estaites of this present Parliament, that na sasing be given within burgh of ony maner of land, or tenement within the samin, in ony time cumming, bot be ane of the baillies of the burgh and the common clerke thereof. And gif ony sasing beis utherwayes given heirafter to be null, and of nane avail, force, nor effect.

(*b*) C. of Kincardine, Feb. 1686, M. 6894.

(*c*) Dawson, 15th June 1824, F. C., 3 S. 136; remitted, 22d May 1826, 2 W. S. 230; reconsidered, 14th Nov. 1827, F. C., 6 S. 19; affirmed 31st March 1830, 4 W. S. 81. See Davie, 2d June 1814, F. C.; Dixon, 1st Feb. 1823, F. C., 2 S. 176. This case (see Bell's Princ. 647,) is not to be relied on.

389. RESIGNATION AND SASINE.—1. *Introductory remarks.*—(1.) This instrument (*a*), which combines the effects of the instrument of resignation and the charter of resignation and sasine of ordinary conveyancing, bears a striking resemblance to the ancient *breve testatum*. In royal burghs the representatives of the Sovereign, who is the superior, being always present, the reasons which induced the separation of the forms used in other holdings have had no place in burgage-holding. The parties or their procurators appear before one of the bailies of the burgh, on the ground of the subjects contained in the conveyance; and the ceremony is begun and concluded on one and the same occasion, and certified in a single deed or instrument prepared and attested by the town or common

clerk. The remarkable convenience and simplicity of burgage conveyancing is well exemplified by this form. (2.) The statute (*b*), which prescribes the mode of giving infeftment within burgh, ordains that none shall officiate except the bailies and the common clerk; but it is understood that in practice the provost occasionally officiates. Such a practice ought to be avoided, as the performance of the duty by the provost seems in one instance to have been supported, on the ground only that the burgh was without bailies (*c*). A sasine taken during the Usurpation, where the Sheriff and Sheriff-clerk officiated in room of the bailies and town-clerk, who were excluded by refusing the tender, was sustained as having been warranted by a commission from the Judges (*d*). (3.) The burgh is not entitled to any composition for giving infeftment to disponees, adjudgers or purchasers at judicial sales (*e*).

2. *Ceremony.*—(1.) The disponer or his procurator appears on the ground of the subjects, attended by one of the bailies, the town-clerk, and two witnesses. The warrant is published to the witnesses and others present, by the town-clerk officiating as notary; the procurator makes resignation in the hands of the magistrate, as for her Majesty, by the symbol of a staff and baton—an essential solemnity (*f*). Then the magistrate delivers earth and stone of the ground of the subjects to the procurator for the disponee, (who may be the person officiating in the same character for the disponer,) and the latter takes instruments in the hands of the notary, and calls the attention of the witnesses to the fact. (2.) Where the town-clerk is proprietor of subjects within burgh, the Court will authorise the Sheriff-clerk of the county in which the burgh is situated to officiate for him in infeftments in his own favour, or proceeding on his warrants (*g*).

3. *Instrument.*—(1.) The notarial instrument of resignation and sasine (*h*) records the ceremony, and is attested in like manner as the ordinary instrument of sasine, to which it is in all respects analogous. It is authenticated by the town-clerk, who must therefore hold the office of notary-public; and in the doquet he describes himself as *notarius publicus et clericus communis dicti burgi de*

(2.) An important variation occurs in this instrument when employed to record sasine *propriis manibus* by a husband to his wife. It is closed by a testing clause in the ordinary form, and subscribed by the husband; and as sasine is given at one and the same time both to the husband and wife, the instrument combines resignation with sasine to each of the spouses (*i*).

4. *Registration.*—(1.) Burgage rights were specially excepted from the operation of the statute of 1617 (*k*). But, on the ground that "there is fully the like reason and bene-"fite that the foresaid statute should extend to the whole "kingdom, as well to burgh as landward," the provisions of that enactment were, at a later period (*l*), made applicable to sasines of tenements holding in burgage, reversions, regresses, bonds or writs for making reversions or regresses, assignations thereto, discharges thereof, renunciations of wadsets and grants of redemption of such tenements; and it is provided by this latter statute, that the town-clerk shall keep a register depending only on the magistrates of the burgh, in which these writs shall be inserted within threescore days after their respective dates, under the like sanction as in the case of ordinary sasines. The books of register are now issued to the town-clerks by the clerk-register; but they remain, after being filled up, in the custody of the former. (2.) A practice having prevailed in some burghs of abbreviating the notary's doquet in its transcription into the register, an act has recently been passed, which declares sasines so erroneously registered to be for the future null in questions with third parties; but validates those registered prior to the date of the enactment (*m*). (3.) The statute of 1681 mentions sasines, reversions, &c. of *tenements within burgh royal, or liberties or freedoms thereof holding burgage.* The question, therefore, in what register a real right ought to be recorded, depends upon the nature of the holding; and thus, where portions of the common subject have been granted in feu-farm, the sasines will be entered in the ordinary register—not the register for the burgh. As above expressed, burgage is presumed when the subjects are part of the original common property, and if the tenure be

doubtful, registration ought to be made both in the burgh register and in the ordinary general or particular register.

(*a*) Jurid. Styles, 1. 608.

(*b*) 1567, c. 27, above, p. 510.

(*c*) Thomson, 3d July 1662, M. 6892. This case is differently read both by Ersk. (2. 3. 41,) and Bell, (Pr. 840.)

(*d*) Lockhart, July 1662, B. S. 1. 482.

(*e*) Hay, 22d July 1634, M. 15,031-41.

(*f*) A. S. 11th Feb. 1708; Carnegy, 2d Dec. 1729, M. 14,316.

(*g*) Duff, 16th Jan. 1823, 2 S. 117.

(*h*) See note (*a*).

(*i*) Jurid. Styles, 1. 610.

(*k*) 1617, c. 16, above, p. 121.

(*l*) 1681, c. 11. OUR SOVEREIGN LORD Considering the great security that this kingdom enjoys by the public register of seisings and reversions, conform to the 16th Act of the 22d Parliament of King James the Sixth, holden in anno 1617. And that there is fully the like reason and benefite that the foresaid statute should extend to the whole kingdom, as well to burgh as landward. Therefore his Majesty, with consent of his Estates of Parliament, STATUTES and ORDAINS, that in time coming all instruments of seisin of tenements within burghs royal, or liberties or freedoms thereof holding in burgage, and all reversions, regresses, bonds, or writs for making reversions, or regresses, assignations thereto, discharges thereof, renunciations of wadsets, and grants of redemption of the said tenements within burgh or the liberties or freedoms thereof holding burgage, shall be insert in the town-clerk's books of the several burghs respective, within threescore days after the date of the same, excepting reversions incorporat in the body of the right, and that the town-clerk shall keep a several book therefor, depending only upon the magistrates of the burgh without necessity of any warrand from the clerk of register, and minut books of the same, to be quarterly compared and signed by the Provost and Bailies of the several burghs. IT IS ALWAYS DECLARED that it shall not be necessary to insert any bands or writs for making of reversions (or regresses) unless seisin pass in favour of the parties makers of the said bands and writs: In the which case it is ordained that the same shall be insert within sixty days after the date of the seising. The extract out of which register shall make faith in all cases, except where the writs so insert are offered to be improven: And if it happen any of the said writs, which are appointed to be insert as said is, not to be duely insert within the said space of sixty days; then and in that case, his Majesty, with advice and consent foresaid, DECERNS the same to make no faith in judgment be way of action or exception, in prejudice of a third party, who hath acquired a perfect and lawful right to the said tenements, but prejudice always to them to use the saids writs against the parties makers thereof, their heirs and successors. And it is hereby DECLARED that there shall be nothing payed to the town-clerks for the registration of the saids seasings, but for any posterior extracts, they shall have the half of the rates prescribed by the Act of Parliament for extracts out of the registers of seisings in the particular shires. And for registrating in the town's books of reversions, assignations thereto, or

discharges thereof, renunciations, and grants of redemption of wadsets, which were not in use to be registrat before in the town's books, that they shall have the half of the rates prescribed by the Act of Parliament, for registration and extracting the same as said is.

(*m*) 10 Geo. IV. c. 19.

TITLE II. REDEEMABLE RIGHTS.

390. HERITABLE SECURITIES.—1. *Heritable bonds, &c.*—These, when completed in the burgage form, do not differ in any essential particulars from bonds in the ordinary holdings, except in having a procuratory of resignation as the only feudal clause (*a*). The right is perfected by instrument of resignation and sasine registered in the burgh register. Such rights may, it would seem, be competently granted to hold base of the debtor (*b*); but this form is not usual in practice.

2. *Adjudications.*—Judicial securities are perfected by instrument of adjudication and sasine if the debtor be infeft, and by instrument of adjudication, resignation and sasine when he has a personal right only.

3. *Ground-annuals.*—This form of constituting a burden on heritage is peculiarly adapted to burgage-holding, which does not admit of sub-infeudation. It is frequent in the city of Glasgow. The forms do not substantially differ from those above described; (§ 137.)

4. *Burdens by jedge and warrant.*—These are imposed by judicial process before the Guild court (*c*).

(*a*) Jurid. Styles, 1. 316, 614.
(*b*) Bennet, 5th July 1711, M. 6895.
(*c*) See Jurid. Styles, 1. 622, *et seq.*

TITLE III. ENTRY OF HEIRS.

391. COGNITION AND SASINE.—1. *Ceremony.*—The simplicity of the burgal forms is in no respect more remarkable than in the entry of heirs. In many of the more ancient burghs the ceremony still maintains of entry by *cognition and hasp and staple*, in subjects in which the ancestor died vested

and seised, which is parallel to that by precept of *clare constat* and infeftment, in the common holdings, and is performed thus: One of the bailies of the burgh, on a claim by the heir, proceeds to the subjects in which entry is to be given, accompanied by the claimant or his procurator, the town-clerk and two witnesses: he examines on oath two or more witnesses in regard to the propinquity of the heir, and if satisfied of his right and title, grants immediate entry and investiture by giving the claimant or his procurator earth and stone of the subjects, and the hasp and staple of the door of the principal dwelling-house, who thereupon assumes actual possession, after the old Roman form, by entering the house and shutting the door; (above, 62. 5.) The ceremony ends by his taking instruments in the hands of the town-clerk, and calling the attention of the witnesses to the fact.

2. *Instrument.*—(1.) The certificate of this primitive ceremony is called an instrument of cognition and sasine (*a*). It resembles other burgage sasines in form, and must be recorded in the burgh register within the statutory period of sixty days. (2.) Where the heir, prior to his entry, has granted a conveyance of the subjects, cognition and sasine to the disponer, and resignation and sasine in favour of the disponee, may be combined in one and the same instrument (*b*).

3. *Precept of clare constat.*—This form of entry has been sustained as competent, but in circumstances which do not appear to give the case much weight as a precedent (*c*). It is understood to be unknown in modern practice.

(*a*) Jurid. Styles, 1. 593.
(*b*) Jurid. Styles, 1. 594.
(*c*) Lockhart, July 1662, B. S. 1. 482.

392. SPECIAL SERVICE.—(1.) Service in special (sometimes, as in Glasgow, called *service by ward of court,*) is customary in those burghs where the entry by cognition and sasine does not prevail, or when doubts exist in regard to the propinquity of the claimant, or in the case of a refusal on the part of the bailies to give investiture to the heir. Under this form the bailies may be charged to give infeftment (*a*). (2.) Special

service takes place on a claim presented by the heir in the burgh court, the form of which varies in different burghs; but in all the service proceeds without the authority of a brieve from Chancery. The statement in the claim is more or less simple. Ordinarily, it sets forth that the ancestor died at the faith and peace of the Queen, vested and seised in certain subjects, the description of which is taken from the last investiture; that the subjects are held in free burgage; and that the claimant stands in a certain degree of relationship, in virtue of which he is nearest and lawful heir to the deceased. The claim concludes with a prayer for service and cognition (*b*). It is remitted by the court to a jury, who, on the usual and legal evidence, serve and cognosce the claimant accordingly, and to their verdict the court interpones its authority. On this sentence a decree or precept is extracted, on the authority of which the bailies may be charged on letters of horning to give investiture to the heir (*c*). (3.) Competition for the character of heir is unfrequent, destinations of burgage subjects being rare, and of no great length or intricacy. The heir-at-law is seldom doubtful. In cases of competition the ordinary rules of procedure on brieves would probably apply, in so far as consistent with the nature of the holding, and the constitution of the court. It does not appear that the Court of Session has any statutory jurisdiction in burgal services.

(*a*) Burgess of Stirling, 15th July 1668, M. 15,021; Gordon, 13th Dec. 1738, M. 15,022.

(*b*) Jurid. Styles, 1. 598.

(*c*) Gordon, as in (*a*).

393. GENERAL SERVICE.—This kind of service proceeds in virtue of a brieve from Chancery, a form which is assumed to have been approved of by the Court in the only case where the question seems to have occurred, although no mention is made in the report of the necessity of a brieve, and a formal determination of the point was not called for (*a*). It may perhaps be considered an anomaly that the bailies, who have the greater power of serving heirs in special, may not exercise the lesser authority, of trying a part of the heads of the claim

of special service in the form of a claim of general service. The procedure on the brieve is in the ordinary form of general service; (above, 353 *et seq.*); and the heir obtains infeftment in virtue of the retour upon the personal right which belonged to his ancestor.

(*a*) Cumming's Creditors, 4th Dec. 1783, M. 14,446.

ADDENDA.

(§ 51, p. 76.) 7. *Provision for enforcing the infeftment of the vassal.*—Circumstances may occur, in which it is for the interest of the superior that the vassal shall complete his right by immediate infeftment. It seems a legitimate exercise of the rights of the superior, to stipulate for such infeftment, as he thus merely insures the completion of the agreement with his intended vassal. The object may perhaps be attained by a clause fortified by an irritant declaration, that any conveyance of the lands and of the precept of sasine in the charter shall be void, or by the use of the words, "*excluding* "*assignees before infeftment.*" But the mere omission of the term *assignees* would not, it is thought, produce the intended effect; (above, § 46.) Nor is it in the power of the superior to withhold delivery of the charter until he shall himself have completed the investiture by infefting the vassal, or to insist that the infeftment shall be expeded by his own man of business (*a*). But this may be made matter of express stipulation, as between the superior and vassal.

(*a*) Stewart, 12th Nov. 1794, M. 15,027.

(§ 56, p. 88.) To note (*ll*) add Wallace, 26th Feb. 1835, 13 S. 564.

(§ 60, p. 96.) The superior is not liable in payment of parochial burdens unless it is so stipulated (*a*). The question, as to the superior's liability in a share of proper public burdens, corresponding to his interest in the subject, can

scarcely occur under the existing practice, which is uniformly to declare an express exemption in the charter or feu-contract.

(*a*) Dundas, 2d July 1778, M. 8511; Murray, 20th Feb. 1794, M. 15,092.

(§ 74, p. 111.) To clause in note (*a*) add, " and that by " delivery to the said D. as procurator foresaid, of earth and " stone of the ground of the said lands, (*other symbols,*) with " all other symbols usual and requisite, after the form and " tenor of the said charter and precept of sasine in all points."

(§ 148. 2, p. 215.) The rent payable at the date of the entry is the rule (*a*).

(*a*) Heriot's Hospital, 27th July 1715, M. 7998.

(§ 149. 2, p. 219.) See, in regard to the confirmation of the sasine, Adam, 12th June 1810, F. C.

APPENDIX.

No. I.

Dispositive Clause of Disposition of Sale containing a Ground-annual. *(See p.* 201.)

SELL ALIENATE and DISPONE from me and my heirs and successors to and in favour of the said B. his heirs and assignees whomsoever heritably and irredeemably ALL and WHOLE (*the subjects*) together with all right title and interest which I the said A. my predecessors and authors had have or can any ways claim or pretend thereto in all time coming. BUT ALWAYS with and under the burden of payment by the said B. and his foresaids to me the said A. and my foresaids of the ground-rent or ground-annual of £. yearly and that at two terms in the year Whitsunday and Martinmas by equal portions beginning the first term's payment at the term of Whitsunday next for the half year preceding, the next term's payment at Martinmas following and so forth half yearly thereafter with the interest of the said ground-rents from and after the respective terms of payment during the not payment and a fifth part more of each termly payment of liquidate penalty in case of failure in the punctual payment thereof which ground-rent or ground-annual with the interest and penalties effeiring thereto as aforesaid is hereby declared to be a real burden on the subjects hereby disponed and as such is appointed to be engrossed in the infeftments to follow hereupon and in all subsequent charters precepts deeds of transmission and infeftments of the same. AND DECLARING as it is hereby PROVIDED and DECLARED that the ground-rent or ground-annual hereby stipulated with interest and penalties effeiring thereto as aforesaid shall be leviable by me and my foresaids from the proprietors tenants and occupiers of the subjects hereby disponed by process of poinding the ground maills and duties or in such other way and manner as real burdens are leviable by the existing laws of the realm for the time being, and that in case the said B. or his foresaids shall allow two years' ground-rent to run into a third unpaid they shall *ipso facto* forfeit amit and lose all right to the subjects hereby disponed and this present right and disposition thereof and all that has followed or is competent to follow hereon and all future transmissions or renewals of the same shall thereby become void and null but the above irritancy shall always be purgeable before declarator or at the bar. AND ALSO DECLARING as it is hereby PROVIDED and DECLARED that it shall not be lawful to or in the power of the said B. or his foresaids to sell alienate or dispone the subjects above described freed and disburdened of the

said ground-rent or ground-annual and that any charter or instrument of sasine to follow hereon or any future precept charter deed of transmission or instrument of sasine of the foresaid subjects which shall not contain and recite the said real burden shall not only be null and void, but the said B. or other person who shall contravene the foresaid provision and declaration shall *ipso facto* forfeit amit and lose all right and title to the foresaid subjects and the same shall devolve and return to me or my foresaids without our incurring any obligation to restore the price or pay the value thereof. *(It is to be observed, that the above irritancies will not be effectual against singular successors unless inserted in the sasines of the subjects.)*

No. II.

Propositions by her Majesty's Commissioners on the subject of Conveyancing.

Propositions.—1. That the casualty of relief and other casualties of superiority, as well as the superior's right to composition upon the entry of singular successors, should in future be discharged, and either commuted for an annual payment, or purchased by the vassal in manner after stated. Where the casualties and composition are commuted for an annual payment, the tenure, if blench, should be converted into feu, the annual payment forming the *reddendo* or feu-duty; and if the holding is already feu, the annual payment should be added to the feu-duty, and be in all respects secured and recoverable as such.

2. That this commutation or purchase should be competent on the requisition either of the superior or the vassal; that where the annual payment, (if the casualties and composition were commuted for an annual payment,) would not, in cases of feu-farm, exceed a certain proportion, say one-fifth of the feu-duty already payable, the conversion should be by purchase only; that it should, in like manner, be by purchase only in all cases of blench-holding, where the casualties are untaxed, or not taxed to a higher amount than one year's rent of the land; but that in all other cases the vassal should not be compellable to purchase, though compellable to convert into an annual payment, and to change the holding, or add to the feu-duty.

3. That in order to facilitate this change, and following the precedent of the 20 Geo. II. c. 50, the Judges of the Court of Session should be authorised and required, on the application of the Lord Advocate, whose duty it should be to make such application, to take into consideration the rate and manner at which this conversion should be made, and whether for a price or for an annual payment, and generally to lay down, by Act of Sederunt, the rules by which the parties should settle and adjust their respective interests; and for that purpose, the Lord Advocate should be authorised and required to lay before their Lordships such information as they may require, to enable them to determine in the matter; or otherwise, a Board or Commission should be appointed for the discharge of these duties.

4. That the rules prescribed in such Act of Sederunt, or in any regulations issued by the said Board or Commission, if such be appointed, should be laid before both Houses of Parliament, and three months thereafter should come into operation, and form the ground upon which the superiors and vassals, or parties interested, should settle and adjust the amount of the said price or of the said annual payment; and in case of any difference arising in any particular case, the Judges of the Court of Session should be authorised and required, upon a summary application, to hear parties, and to determine the amount of the price or annual payment, as the case may be, having regard to the rules laid down by the said Act of Sederunt, or by the said Board or Commission, but with power to award expenses.

5. That in all cases in which the conversion of the casualties and composition is made by purchase, a deed of discharge by the superior, specifying the lands, acknowledging receipt of the price, and discharging his right to the casualties and composition, should, when duly recorded in the Register of Sasines, operate a disencumbrance of the lands from all casualties and composition in future, as fully and effectually as if these had been specially renounced in the original grant to the vassal. The expenses of this deed should be paid by the vassal.

6. *Expenses of the deed to be laid on the vassal.*—That, in like manner, where the casualties and composition are commuted for an annual payment, a charter of *novodamus* should be granted by the superior, discharging the said casualties and composition, and stating as the *reddendo* the said annual payment, or, where the holding was already feu, the original feu-duty, and said annual payment, *in cumulo*. And sasine on such charter of *novodamus*, duly taken and recorded, should be held to disencumber the lands of said casualties and composition, as effectually as if these had been specially renounced in the original grant to the vassal, and to impose the *reddendo*, or additional *reddendo*, as effectually as if such payment, or additional payment, had been contained in the original grant. The expense of the charter and sasine should be defrayed by the vassal.

7. That the said conversion, whether for a price or for an annual payment, should be effectual if made with the party who has right to the first estate of superiority in order which is not defeasible at the will of the vassal; and such conversion, and such deed of discharge, or such charter of *novodamus* and sasine, should be as effectual, though the said party having right to the superiority should not be infeft, as if he had been infeft and feudally vested with the superiority.

8. That after the lapse of ten years, from the system coming into operation, the casualties and right of composition should be *ipso facto* extinguished and discharged, reserving to the superior thereafter a personal action only against the vassal then infeft, and his heirs and representatives, for the price of the casualties and composition. In computing the said ten years, the minority, or the period during which either party shall not be *valens agere*, shall be deducted.

9. That where a party has granted a disposition with a double manner of holding, and indefinite precept, or with a holding simply *a me*, or silent as to the manner of holding, sasine by the dispo-

nee, or his heirs or assignee, duly taken hereafter and recorded, should be held and construed to be, and should in all respects operate, as a sasine duly confirmed by the superior of the disponer; or in the event of there being an estate or estates of mid-superiority, defeasible at the will of the disponee, then it should be held and construed to be, and should in all respects operate, as a sasine duly confirmed by the first superior in order, whose estate of superiority is not defeasible, or whose vassal first granted a disposition with a double manner of holding, or with a holding simply *a me*, or silent as regards the holding; and it should be no objection to the sasine so taken, or in any degree affect its validity, that the titles of the superior, whose confirmation is thus implied, were not *de facto* completed. Provision must be made under this and some of the following heads for the protection of third parties, who, *before* the recording of the sasine so held to be confirmed, may have acquired rights that would have prevented, as *media impedimenta*, the operation of confirmation.

10. That hereafter where a party has died infeft, the heir having been specially served, should be entitled, upon the extract of the judgment pronounced in his service, to take and record sasine without any precept of *clare constat*, or other warrant from the superior; and such sasine being duly taken and recorded, should be construed and be held to be, and should in all respects operate as a sasine taken upon precept from the superior; or in the event of there being an estate or estates of mid-superiority defeasible at the will of the heir, it should be held and construed to be, and should, in all respects, operate as a sasine taken upon charter of confirmation and precept from the first superior in order, whose estate of superiority is not so defeasible, or whose vassal first granted a disposition with a double manner of holding, or with a holding simply *a me*, or silent as regards the holding; and it should be no objection to the sasine so taken, or in any degree affect its validity, that the titles of the superior, whose precept, or confirmation and precept, are thus implied, had not been *de facto* completed.

11. That, in like manner, sasine on decree of adjudication, without direct warrant from the superior, by an adjudger, or his heir or assignee, duly taken hereafter and recorded, should be held and construed to be, and should in all respects operate as a sasine taken upon the precept of the superior, against whom the said decree warranted charge of horning; and in the event of there being an estate or estates of mid-superiority defeasible at the will of the adjudger, then it should be held and construed to be, and should in all respects operate as a sasine, confirmed as aforesaid.

12. That there should be, nevertheless, reserved to the said superior, whose precept, or confirmation and precept, are thus implied, a right to challenge the said sasine by reduction or exception, as the case may be, upon any ground or reason that would have entitled him to object to a charter of resignation, if tendered in the same terms and upon the same conditions as expressed in the sasine, or to the sasine itself, as inconsistent with, or contrary to, its warrant; such challenge, however, being competent to the superior alone, and in so

far only as his rights or interests are concerned: And it should be further declared, that the sasine so taken and recorded should in no degree affect the *reddendo* payable to the superior under the original grant, or in consequence of the conversion of the casualties of superiority and composition, or the remedies by which the same may be enforced; but reserving to the vassal all pleas of prescription that would, by law, have been competent to him if he had held base by a sasine, in the same terms taken on a precept granted by the vassal last infeft, and to the superior his defences, as accords.

13. That the vassal, or his heir or disponee, shall be obliged, on requisition of the superior, to submit his title-deeds of the estate held of the superior, from the date of the last entry, to the inspection of the superior or his agent; and, in the event of their not having been previously exhibited to the said superior, and of the said vassal, his heir or disponee failing to do so, upon the requisition of the superior, the superior should be entitled to bring a summary action before the Sheriff of the county, concluding for exhibition and inspection of the said title-deeds; in which action the said vassal, or his heir or disponee, should be obliged to produce and exhibit upon oath, with power to the Sheriff to award costs in the said action.

14. That in the event of sasine being put upon record by the heir or disponee or creditor adjudger of the vassal, in such terms as the superior was not compellable to warrant, it should be competent to the said superior to require the party so erroneously or improperly infeft to take a charter of *novodamus*, in terms consistent with the superior's right and interest; and sasine upon that charter, duly taken and recorded, should thereafter form the proper title to the estate, and qualify the rights of all parties acquiring any personal or real right thereto.

15. That in all cases where the vassal has put upon record a sasine inconsistent with the superior's right and interest, it should be competent for the superior to bring an action of reduction and declarator, or of declarator, concluding for reduction, if necessary, in so far as concerned the superior's right and interest, of the erroneous sasine, and for declarator of the special terms in which such sasine ought to have been taken and recorded; and if the superior should obtain decree in the said action, and record the said decree in the Register of Sasines, the said sasine so taken should be held and construed as if they had been taken originally in terms of the said decree, and the rights and interests of all parties, arising out of, or depending on, the said sasine, be regulated and determined accordingly. The superior, if he obtains decree in terms of the libel in such action of declarator, or reduction and declarator, should be entitled to costs of suit, as between agent and client, without any power in the Court to modify the same, unless the sasine, previous to its being taken and recorded, had been tendered to the superior or his agent for revision, and revision had been refused, or unless the vassal had offered to take a new title by charter of *novodamus*, and sasine on that charter, where such charter and sasine would have been a competent and sufficient mode of amending and reforming the title, or, unless the superior had in-

sisted upon conditions being inserted or omitted contrary to the vassal's right and interest; in all which cases such costs should not be given of course, but the question of expenses should be left to the discretion of the Court: That, in the event of the vassal obtaining absolvitor from such action, on the ground that the title, as completed, contained nothing to which the superior had right to object, the vassal should, in like manner, be entitled to costs of suit, as between agent and client, without any power in the Court to modify the same.

16. That in the event of the service of the heir being sustained as a warrant of infeftment, without the intervention of the superior, the superior should be compellable to confirm the entry of the heir by charter of confirmation or indorsation, acknowledging and recognising the party to be his vassal, on the same terms and conditions that he is now compellable to grant a precept of *clare constat.*

17. That hereafter it should be declared unnecessary that any *disposition* should contain obligation to infeft, procuratory of resignation, or precept of sasine, but that a disposition of the lands, without procuratory or precept, should form of itself a warrant for infefting the *nominatim* disponee; and such disposition, with general service or assignation, should, in like manner, warrant infeftment in favour of the heir or assignee of the disponee, precisely as if it had contained procuratory and precept, the disposition being duly narrated in the instrument of sasine, and the service or assignation in the case of the heir or assignee, as now required by the Statute 1693, c. 35.

18. That in like manner every disposition should be held to imply an assignation to maills and duties from the date of entry, as also an assignation to writs and evidents, and an obligation to make them forthcoming; as also a clause in conformity to such warrandice as the law in the circumstances would infer.

19. That it should nevertheless be competent to the parties to complete their titles by precept of *clare constat*, or charter of adjudication, resignation, confirmation, or otherwise, to the same purpose and effect, and in the same manner, as is now competent and in use.

20. That the superior hereafter should be compellable to enter his vassal by confirmation, in the same manner, and by the same process, by which he is now compellable to give entry by charter of resignation; and that an indorsation on the disposition or deed confirmed, duly subscribed by the superior, containing an acknowledgment or recognition that the party is his vassal duly entered, should be, to all intents and purposes, equivalent to an entry by charter of confirmation, and that the superior should be compellable, if required, to grant confirmation by such indorsation. The indorsation should be held to imply, on the part of the superior, that the whole demands previously competent against the vassal, in respect of his estate of superiority, have been satisfied, reserving to the superior to refuse confirmation by charter or indorsation till he is paid all his just claims.

21. That hereafter sasine, upon a conveyance *a me*, though not confirmed, should be as valid and effectual against all third parties, the superior only excepted, as if the instrument of sasine had proceeded on a disposition *a me vel de me;* declaring, however, that no

question of competition, wherein the ground of claim had been constituted, prior to the enactment coming into force, should be affected by that enactment; but that, in all such cases, the sasine should be dealt with as a sasine requiring confirmation in order to its validity.

22. That confirmation, whether by charter or indorsation, granted by the superior, whose estate is the first in order, that is not defeasible by the vassal, holding by progress, or successive dispositions *a me*, or *a me* and *de me*, should be held to extinguish all the intermediate defeasible superiorities, without the necessity of specially confirming them, but simply by the acknowledgment or recognition of the party as vassal, and that the said superior, whose estate is the first in order, not defeasible, should be compellable to grant entry by confirmation, as if he had been the immediate superior of the last disponer.

23. That in the event of the superior being unknown or unable to act, by not having made up his titles, or otherwise, as also in the event of his wilfully refusing to act, it should be competent to the party requiring the superior's concurrence to make application to the Sheriff, or Court of Session, who should be empowered, after due notice of the application, and upon production by the applicant of the last charter granted by the superior, or the last deeds confirmed by the superior, to act for the superior, *pro hac vice*, and to grant the entry required in terms of the last investiture. This, and the two preceding propositions, will not be necessary, if the 10th proposition, and those immediately following it, shall be adopted.

24. That when the interests of a superior in his vassal's estate shall consist merely of proper feudal casualties, or annual payments under a certain yearly value, with reference to the yearly value of the vassal's estate, or when a superior, who has interests exceeding such value, shall refuse to grant his vassal an entry, in such terms as may be lawfully demanded, it shall be competent to the vassal to require the superior to sell and renounce his right for a price to be offered; and in case the superior shall agree to sell his estate of superiority at the price offered, the same, upon the superior's deed of sale or renunciation being recorded in the Register of Sasines, shall be *ipso facto* extinguished, whether the superior shall have completed his titles or not, and the vassal shall hold of the over-superior in the same way and manner, to the same effect, and under the same conditions, as the superior held his superiority. And in case the superior shall refuse to sell at the price offered, the Sheriff, or Court of Session, should be authorised, on a summary application at the vassal's instance, to fix the value of the superior's interests in the vassal's estate; and on the same being paid or consigned by order of the Court, the Court shall pronounce decreet of extinction, which being recorded in the Register of Sasines, shall have the same effect as a voluntary deed of sale or renunciation by the superior: Provided always, that this proposal shall not extend to cases in which the vassal's title is limited by conditions and restrictions in favour of third parties, and the superior's is unlimited, or not similarly limited; nor to cases in which the superior's interests in the vassal's estate com-

prise reserved rights of minerals, or other rights of any other kind than proper feudal casualties, or annual payment.

25. That hereafter, in the case of ground feued for building, it should be sufficient that the conveyance by a vassal to a disponee should refer to the sasine taken on the original feu-charter, or to that sasine, and the clause amending it, where it has been amended by decree, or to the sasine or charter of *novodamus*, where the title has been renewed or amended by charter of *novodamus*, and such reference should be as effectual to qualify the grant as if the conditions themselves had been specially inserted in the disposition, or in the sasine following on the disposition, and that a similar reference should be effectual in the service of heirs: Provided always that no reference should be effectual, unless the deed referred to was at the time in force, and operative on the feu.

26. That hereafter, the ceremony of taking sasine on the lands, and by symbolical delivery, should be entirely abolished, and that an instrument, authenticated by a notary, narrating generally the disposition or special service, and also the assignation or assignations, and general service, or other deeds vesting the personal right in the party requiring infeftment, and setting forth the description of the lands, and the terms and conditions under which they are to be held, and on which infeftment is to be given, as contained in the disposition or special service, and also setting forth that delivery, in terms thereof, was made to, and taken by the disponee, or assignee or heir, as the case may be, should, of itself, when duly recorded in the Register of Sasines, be held, and construed to be, to all intents and purposes, a valid and effectual instrument of sasine in the lands or others in which it is intended to give infeftment: That such instrument should be presented to the keeper of the record blank in date, and the date should be by him filled up, when he receives the same for registration, and makes the corresponding entry in the Minute-Book.

27. That brieves from Chancery should be discontinued, and that services should originate in a summary application or claim to the Sheriff of the domicil of the deceased, or Sheriff of Edinburgh in general services, or the Sheriff of the bounds in which the lands lie in special services, or the Sheriff of Edinburgh in cases to which at present the brief may competently be directed to him; and that a short record of this application should be made in Chancery, previous to being presented to the Sheriff.

28. That in general services, the claim should set forth the death of the ancestor, and the claimant's propinquity or character as heir of provision: in special services, the death, with its date, the lands, the superior, the *reddendo*, the extent in Crown holdings, the propinquity, or the character as heir of provision.

29. That the petition should be presented to the Sheriff within six months of being recorded in Chancery, and bearing a certificate of its having been there recorded, and the Sheriff should thereupon issue an order for publication by advertisement, such as Parliament shall fix.

30. That the service should proceed without a jury, the evidence,

documentary or parole, to be preserved, and the judgment to be indorsed on the application. In the event of either party demanding trial by jury, it shall be competent to advocate the cause to the Court of Session, the procedure therein to be regulated as in an ordinary jury cause; each competing party having right, whatever may be the verdict on his own claim, to oppose the claim of his antagonist, which should not be sustained as matter of course.

31. That the party served should be furnished with an extract of the decree, which should be declared to have the same effect as an extract retour at present. In special services, an extract should serve as a retour, and should be a warrant for sasine.

32. That the proceedings in services before the Sheriffs should from time to time, as fixed by the order of Lord Register, be transmitted to Chancery, or to some other department of the general Register-House.

33. That the proceedings in cases of tutory, idiotry, and furiosity, should be by petition or claim to the Sheriff, and should be commenced, carried through, and completed as in other cases of service.

34. That brieves of terce, division, perambulation, and lining should be discontinued, and the procedure should be by petition or claim to the Sheriff.

35. That hereafter, in constituting an heritable security, it should not be necessary, in the deed granted by the debtor, to insert an obligation to infeft, or a precept of sasine, or a procuratory of resignation, or an assignation to the rents, or clause of warrandice, or power to enter into possession, or power of sale.

36. That without sasine taken on such a deed, or any instrument extended, it should be competent to record the bond and disposition in security itself in the Register of Sasines, as sasine, to the full effect of completing the real feudal right of the creditor, the date of the recording thereof being the criterion of preference.

37. That it should by statute be declared, that such a deed, when recorded, shall imply (under such modification as the parties may stipulate) 1*st*, the degree of warrandice by law resulting from the transaction; 2*d*, a power to levy rents or assume possession.

38. That an assignment, written on the back of the recorded bond, or a short and simple deed of assignation separately, provided such assignation should be recorded in the Register of Sasines, should, from the date of recording, operate as an effectual transference of the debt and real burden.

On the less important branches of inquiry, we have not thought it necessary to lay down any distinct or specific propositions, because the nature of the change proposed has been made sufficiently intelligible by the remarks made in the course of our Report, and the Propositions would have been a repetition merely of what we had already stated.

Conclusion.—In bringing these suggestions to a close, we think it not unnecessary or unimportant to remark, that the improvements we have recommended, while perfectly consistent with each other,

may yet be separately adopted. We have stated the improvements which we think may be safely introduced generally into the system. But if it should be thought that we are advancing too rapidly, we are not aware that any part may not be taken by itself, and the improvement adopted in conformity with the system as it exists at present, and as it will present itself if amended according to our views. Thus the improvement, by abolishing the use of Latin—by simplifying the disposition and charter—by dispensing with sasine on the lands, and amending the instrument of sasine—by compelling entry by confirmation, and simplifying the mode of such entry—are all of them perfectly consistent with the system as it now exists, requiring the actual concurrence of the superior in every step by which the title is completed. The law of service may be amended and improved, leaving every thing else untouched. The amendments we have proposed as to heritable bonds may be carried into full effect, leaving the law, as it now stands, in full force, as regards the radical right of property. The same thing is still more obvious with respect to the minor suggestions with which we have concluded. And we trust it may be permitted to us to observe, that we think this the necessary and beneficial consequence of the views on which we have proceeded; because, as we have always had in view to preserve untouched the great principles of our system—to retain substantially all existing rights and relations—to improve, by substituting and abridging, rather than deviating from established and well-marked lines—and, wherever we are forced to deviate, by adopting some clear, obvious, and direct analogy—no change introduced into any part of the system, if we have been successful in following the end we had in view, should be found discordant, either with the improvements we have proposed, or with the system as it actually exists.

We are quite sensible that the amendments we have proposed have gone far beyond what has been suggested generally by the professional gentlemen who did us the honour to state their opinions. We have not differed from them, or advanced further, without great deliberation, being not more satisfied of the integrity and impartiality which marked their evidence, than the weight due to their acknowledged eminence, to their great talents, and mature experience. Nothing, we may be allowed to say, can be less justifiable to any one acquainted generally with the members of the higher branches of the profession, than the idea of resistance on their part to any course of safe and judicious improvement. But, as no class of men can know so well the danger of rashly innovating a system of which the parts are so dependant that a change any where necessarily affects the whole, they are naturally and wisely jealous of any change, slow to introduce it, and suspicious of its possible results. If rash schemes of speculative improvement were to be adopted, there is not an estate in the country that would not be in the hands of law agents, nor any court that would not be filled with business. If the object in improving legal proceedings be to multiply suits, it would unquestionably be attained, and never better or more certainly attained, than by breaking up old foundations, disturbing the ordinary channels of justice, rendering

useless all that judicial wisdom has ruled for example, and removing the land-marks which define the sacred rights of property. Short of all this, there is vast room for improvement. It has been our purpose, even while prosecuting unsparing reform, to keep within those bounds beyond which there is really danger. We believe that our suggestions, when dispassionately canvassed, will ultimately be received as safe and practicable by the profession of the law, in all its departments. Though their caution may sometimes be extreme, we certainly regard their apprehension of change as a great safeguard of the law, which we think then most entitled to praise, when it furnishes a clear and unchanging light to guide men's actions, and determine their rights, and regulate their interests. But we ought to add, that we feel the greater confidence in the safety of what we have proposed, from being enabled to say, that the two very eminent individuals of whose services we have been deprived, and who united more knowledge and ability than perhaps any others who could have been appointed to this task, would have approved of the suggestions which we have thought it our duty to recommend. The opinions often expressed by them, not in our earlier deliberations only, but after much evidence had been taken, leave no doubt on this point, and justify our adding to this Report the sanction of their authority.

We humbly submit this our Third Report to your Majesty's royal consideration.

(Signed) GEORGE JOS. BELL.
JOHN A. MURRAY.
JOHN CUNINGHAME.
JOHN CAMPBELL.
AND. RUTHERFURD.
JA^{s} REDDIE.
ADAM ANDERSON.
J. E. DRINKWATER BETHUNE.
WILLIAM BELL.
JOHN DUNDAS.

Dated 13*th January* 1838.

Supplemental Note by the Lord Advocate and Lord Cuninghame.

The changes recommended in the preceding Report are all great improvements in the existing system of conveyancing, and we believe that they will be productive of great benefit to Scotland.

We feel it our duty, however, to state, that it appears to us that the Report might with perfect safety have given an option to all disponees holding a disposition, or other warrant directly in their own favour, of obtaining infeftment by recording it in the Register of Sasines. This would preclude the risk of any mistakes in the preparation of an instrument of sasine, and save the expense of recording

the deed in another register. Under such a system, the cost of completing titles to small properties, and in the great majority of cases of most frequent occurrence in practice, would be greatly reduced, and the simplicity and economy of obtaining infeftment by recording the deed would probably soon bring it into general use.

In the comparatively few cases where there might be objections to recording dispositions or other deeds, the form of instrument recommended in the Report would be used with advantage.

(Signed) JOHN A. MURRAY.
JOHN CUNINGHAME.

DISSENT.

On the proposal in the foregoing Report, for implying, by a legal fiction, the concurrence of the superior in every transmission of property, so as, without his actual intervention, to enable the vassal to complete his title, we feel it to be our duty, from its importance, to express a separate dissent. We dissent, for the following reasons:

I. The right of a superior, however extensive his vassalage, is acquired, held and transmitted by his general title to the lands, while his interest in the feu—the stipulations for payment of feu-duty—the reserved rights of coal and minerals—and the other limitations and conditions of the vassal's right, appear only in the titles of the vassal. Hence, the superior's protection chiefly depends on these being retained in the vassal's titles. The necessary recurrence to the superior at certain intervals, and the exhibition of the vassal's titles on each renewal of the investiture under the existing system, have been found in practice to afford effectual protection against encroachment, not only to him, but also indirectly through him, (in estates of extensive vassalage,) to the co-vassals interested in the conditions of the feu; and the superior and his co-vassals have the benefit of this protection without expense, as the investiture is renewed at the cost of the vassal. By implying the superior's concurrence in every transmission of the vassal's property, as proposed in the Report, the necessity of this recurrence will cease, and the protection of the superior and the co-vassals will be left to rest on the uncertain and troublesome remedies of searching the record, actions at law, and a constant attention to the state of the vassalage. It appears to us that these remedies will not afford adequate protection; and that the enforcement of them will be attended with very great expense and annoyance to the superior as well as to the vassal.

II. The principle on which the proposal professes to proceed is, that the law shall imply merely that concurrence on the part of the superior which he might now be compelled to grant. In its operation, however, the proposal would be inconsistent with this principle. At present, a superior cannot be compelled to renew an investiture, except under the conditions of the original grant. But, under the proposed system, his concurrence is to be implied in all transmissions,

without exception, even where they are at variance with such grant, leaving to him what seems to us a very insufficient remedy, a power to challenge and reduce the vassal's titles, in so far as inconsistent with his right; and on his failing to challenge, subjecting him to the total or partial loss of his rights and interests in the feu, where prescription has run on an adverse title even without adverse possession. Without an extension of the law of prescription in favour of the superior, (a measure of very doubtful expediency,) or without an actual recognition by him of each investiture, (provision being made for the case of his absence, incapacity or refusal,) the interests of the superior will be put in peril. One or other of these alternatives we conceive to be indispensable.

III. The proposal is more peculiarly open to objection, in its application to existing titles. As the implied confirmation of the first infeftment taken under the new system is to have the effect of confirming all antecedent unconfirmed infeftments, the superior's opportunity of challenging his vassal's title, in so far as inconsistent with his rights, will thus be lost or limited, according to the time during which the earliest infeftment so held as confirmed has stood upon the record.

IV. By adopting other changes which have been suggested, and which, in themselves, are of a very comprehensive nature, most of the evils that are complained of under the present system will be so far corrected, as not to require that more radical alteration proposed in the Report, which appears to us to be calculated to endanger the rights of the superior.

(Signed) ADAM ANDERSON.
WILLIAM BELL.
JOHN DUNDAS.

INDEX.

The numbers refer to the page.

Q.

R.

S.

THE END.

Printed by James Walker,
6. James's Court, Lawnmarket,
Edinburgh.

ERRATA.

Page 13, last line, *for* " § 16." *read* " § 13. 5."
—— 14, third line from top, insert " (*f*)."
—— 22, third line from foot, *for* " § 21." *read* " § 23."
—— 26, second line from top, *for* " formal " *read* " informal."
—— 29, fourth line of the section, *for* " whosoever " *read* " whosesoever."
—— 33, *for* " Title III." *read* " Title IV."
—— 86, seventh line from top, *for* " (4.) *read* " (5.)"
—— 110, tenth line from foot, *for* " (*x*)" *read* " (*z*)."
—— 176, top line, *for* " § 121." *read* " § 122."
—— 205, seventh line from top, delete " (*r*)."
—— 215, eleventh line from commencement of section, *for* " disponer" *read* " disponee."
—— 217, fourth line from top, *for* " declaration " *read* " declarator."
—— 269, twelfth line from top, *for* " his creditor." *read* " this creditor."
—— 318, eleventh line from foot, *for* " grantee " *read* " granter."
—— 319, eighteenth line from top, *for* " *re* " *read* " *rei*."
—— 340, thirteenth line from top, delete " it contain," and in the following line, " *for* clauses, directed," *read* " clauses be directed."
—— 406, eleventh line from foot, *for* " relative " *read* " resolutive."
—— 421, transpose notes (*a*) and (*b*.)
—— 469, seventeenth line from top, *for* " general" *read* " special.
—— 493, fifteenth line from top, *for* " (*c*) " *read* " (*b*)."

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